89- 1444
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., as Personal Representative of the Estate of Velma Rife Jones (deceased), et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

EDWARD F. RUBERRY
Counsel of Record
CARLOS DEL CARPIO
TIMOTHY J. HARRIS
BOLLINGER & RUBERRY
54 West Hubbard Street
Suite 500
Chicago, Illinois 60610-4620
(312) 527-1001

Attorneys for Petitioner, Shriners Hospitals for Crippled Children

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees a trust beneficiary notice of a judicial proceeding required for approval of the sale of property which is obligated to the trust where the trustee, by virtue of his contemporaneous duties to others, serves interests which are in conflict with those of the trust.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Petitioner is a remainderman of a charitable remainder unitrust established in the will of Velma Rife Jones. The Petitioner has no parent or subsidiary corporations.

The respondent parties to this action are: First Security Bank of Utah, N.A., which serves as co-personal representative of the Estate of Velma Rife Jones and trustee of the charitable remainder unitrust; First Security Bank of Rock Springs, which serves as co-personal representative of the Estate of Velma Rife Jones pursuant to the Wyoming ancillary administration; and the purchasers of the Rife Ranch from the Estate of Velma Rife Jones: the Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole.

The University of Utah is also a remainderman of this testamentary charitable remainder unitrust but is not a party to this action. Darrell Rife Mork, the life income beneficiary of the unitrust, is deceased and is not a party to this action.

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., as Personal Representative of the Estate of Velma Rife Jones (deceased), et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

Shriners Hospitals for Crippled Children, a Colorado charitable corporation, petitions for a writ of certiorari to review the judgment of the Supreme Court of Wyoming in this case.

OPINIONS BELOW

The original opinion of the Supreme Court of Wyoming is reported at 770 P.2d 1100 (App. A, *infra*). The Wyoming Supreme Court's opinion on rehearing is reported at 782 P.2d 229 (App. B, *infra*). The opinion of the District Court in and for Sweetwater County, Wyoming is not officially reported (App. C, *infra*).

JURISDICTION

The initial decision of the Supreme Court of Wyoming in this matter was issued on March 21, 1989. (App. A.) After rehearing, the Supreme Court of Wyoming modified its opinion on November 15, 1989. (App. B.) On January 31, 1990, the Honorable Byron R. White, Circuit Justice for the Tenth Circuit, extended the time for filing a Petition for a Writ of Certiorari to March 15, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) as the decisions rendered by the Supreme Court of Wyoming are repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portion of the Constitution of the United States, Amendment 14, Section 1, and Wyoming Statutes 2-7-202, 2-7-205, 2-7-614, 2-7-615, and 2-7-620 are set out in Appendix D.

STATEMENT

Velma Rife Jones, a resident of Utah, died testate on October 19, 1986, leaving a sizable estate. (App. A 2; R. 1[1].) The bulk of the estate took the form of an approximately 40,000-acre parcel of fee and leased real property located in Wyoming and widely known as the Rife Ranch. (App. A 3; R. 1-4.)

Mrs. Jones' last will and testament provided general bequests of $10,000 each to six cousins. (App. A 2; R. 13.) With respect to the residue of her property, the will created a charitable remainder unitrust[2] under which Mrs. Jones' sister, Darrell Rife Mork (who was 81 years old on the date of Velma Rife Jones' death), was named the life income beneficiary. (App. A 2-3.) Mrs. Darrell Rife Mork died during probate of the Jones estate. (R. 13-24.) Two charitable organizations, Petitioner, Shriners Hospitals for Crippled Children,[3] and the University of Utah,

---

[1] "R. ____" denotes references to the original record of District Court proceedings filed in the Supreme Court of Wyoming.

[2] A charitable remainder unitrust is a trust established pursuant to Section 664(d)(2) of the Internal Revenue Code. For a trust to qualify for the benefits of this provision, a fixed percentage (not less than 5% of the net fair market value of its assets) must be paid, at least annually, to one or more non-charitable persons, for life or a term certain. Following the termination of the above-mentioned payment (usually caused by the death of the life income beneficiary) the remainder interest of the trust must be transferred to, or held for the use of, a qualified charitable organization. *See generally* Swados, *Charitable Remainder Trusts—Drafting and Valuation Guidelines*, 29 N.Y.U. Inst. on Fed. Tax. 2023 (1971). Pursuant to § 2055(a)(iii) of the Internal Revenue Code, the Estate of Velma Rife Jones claimed a tax deduction for the unitrust of $875,037.73. (R. 862.)

[3] Shriners Hospitals for Crippled Children (hereinafter "Shriners Hospitals") is a charitable institution which operates 20 free hos-

(Footnote continued on following page)

were named the remainder beneficiaries of the unitrust. (R. 16.) The will named First Security Bank of Utah as trustee of the testamentary unitrust. (R. 13.) In addition to its responsibilities as trustee, responsibilities which included protecting the interests of the beneficiaries of the unitrust, First Security Bank of Utah also served as co-personal representative of the estate of Velma Rife Jones. First Security Bank of Rock Springs (Wyoming) also served as co-personal representative of the Estate of Velma Rife Jones in connection with all proceedings concerning the Rife Ranch. (App. A 2-3.)

Although Mrs. Jones' will provides that the estate's obligation to pay the unitrust amount commences on the day of her death, the estate first had to pass through probate proceedings in both Utah, the state in which Mrs. Jones resided, and in Wyoming, the state in which the ranch is located. Nevertheless, despite Shriners Hospitals' property interest, it was not notified of either the Utah or Wyoming probate proceedings. Indeed, Petitioner did not even learn of the existence of the trust or its assets until after the Rife Ranch had been sold by the co-personal representatives.

Soon after the Jones will was admitted to probate, the co-personal representatives took action to sell the Rife Ranch to a group of local investors. Significantly, in the

---

[3] *continued*
pitals in 16 states. It is devoted to providing free care to children with orthopaedic defects or diseases and children suffering from serious burn injuries. In 1988 Shriners Hospitals provided free inpatient and outpatient care at a cost of approximately $172 million. These services were funded by charitable contributions and earnings from endowment assets. Substantially all contributions to Shriners Hospitals' are from decedents who make outright or deferred gifts. R. Robertson, *Reports: Shriners Hospitals For Crippled Children* (1988).

filing to commence probate, First Security Bank of Utah, as the personal representative of the estate, estimated the value of the Rife Ranch at $1.2 million. (R. 1-5.) This figure, which appears to have been based on a November 1985 appraisal of the Rife Ranch (R. 265.), did not purport to account for the subsurface mineral rights associated with the property.[4] Nonetheless, the co-personal representatives decided to effect a private sale of the Rife Ranch including its mineral rights for $820,000. Pursuant to that effort, the co-personal representatives filed a petition with the District Court in and for Sweetwater County, Wyoming seeking judicial approval of the private sale as is required by Wyoming law. *See* Wyo. Stat. 2-7-614. (R. 54-61.) In that petition the co-personal representatives asserted to the court that proper notice of the hearing had been provided to the beneficiaries of the $10,000 general bequests and to the trustee of the unitrust.[5] (App. A 4; R. 38.) Neither the life income beneficiary nor any of the charitable remaindermen were given formal notice of the petition for approval of the sale of the Rife Ranch.[6]

---

[4] "No detailed search of the records was undertaken to ascertain the exact status of mineral rights of the subject property." (R. 265.) *See also* n.8, *infra.*

[5] In other words, the First Security Bank of Utah represented to the court that it had given notice to itself, as trustee of the unitrust, of its intent to sell the Rife Ranch.

[6] According to W. John Lamborne, Vice President and Trust Officer of the First Security Bank of Utah, both Darrell Rife Mork, the life income beneficiary, and the University of Utah, the co-remainderman, were informed of the Respondents' intention to sell the Rife Ranch prior to filing of the petition for approval of the sale; both beneficiaries informally consented to the proposed sale. (R. 499.) Shriners Hospitals was not consulted about the proposed sale and, in fact, was not aware of the existence of the unitrust until after the sale.

(App. A 4.) The petition also represented to the court that the beneficiaries of the unitrust, including Shriners Hospitals, had "no desire to own or operate the Rife Ranch" and that sale of the Rife Ranch was necessary to provide liquid assets to satisfy the estate's debts and the "costs of administration" of the estate. (R. 57.)

On May 19, 1987, a hearing concerning the proposed sale of the Rife Ranch was held before the District Court in and for Sweetwater County, Wyoming. Since Petitioner was not notified of the proceeding to sell the Rife Ranch, it had no opportunity to challenge the Respondents' assertion that Petitioner as an ultimate beneficiary of the property had "no desire to own or operate the Rife Ranch." (R. 57.) Nor did Petitioner have the opportunity to challenge Respondents' claim that sale of the Rife Ranch was required to provide liquid assets for the payment of the estate's debts and for the "costs of administration" of the estate.[7] (R. 57.) Nor did it have the opportunity to challenge the sale price of $820,000 and to point out to the court just how far below market value that price was, especially when mineral interests are considered along with their potential benefit to the trust in the future. With no one challenging the proposed sale, on May 19, 1987, the Wyoming District Court entered an order summarily approving the sale of the Rife Ranch. (R. 94-98.)

---

[7] Given the opportunity, Shriners Hospitals' would have explained to the District Court, that the estate had liquid assets in the amount of $378,765 and liabilities in the amount of $269,825. (R. 721, 766-768.) Petitioner would have argued, as it later did, that these figures suggest that something other than liquidating assets motivated the Respondents when they agreed to sell the Ranch to the group of local investors through a private sale.

Approximately two months later, the Petitioner learned fortuitously from a third party that it was a beneficiary under Mrs. Jones' will and that the Rife Ranch had been sold, with court approval. Petitioner filed a Motion for Relief under Wyoming Civil Procedure Rule 60(b), asserting that the court's approval of the sale without notice to the charities whose property interests were so directly affected, violated both Wyoming Statute 2-7-205(b) (App. D 2.) and the Due Process Clause of the United States Constitution. (R. 131-136, 142-166, 718-765.) The District Court denied the motion without addressing the constitutional challenges. (App. C; R. 596-601, 900.)

By a three to two vote, the Wyoming Supreme Court affirmed the District Court's denial of the 60(b) motion. (App. A.) The Wyoming Supreme Court held that Shriners Hospitals had no right to notice under Wyoming statutory law or the United States Constitution. In its initial opinion issued March 21, 1989, the court rested its analysis on its conclusion that Petitioner's remainder interest was contingent, not vested. The interest, the court reasoned, was contingent because Shriners Hospitals might not qualify as a charitable organization on the date the life beneficiary dies. (*Id.* at 8.) Chief Justice Cardine, joined by Justice Rooney, dissented, arguing both that notice to the remaindermen was required under Wyoming law and that approval of the sale of the Rife Ranch without notice to Shriners Hospitals violated its right to due process of law. (*Id.* at 9-10.)

The Wyoming Supreme Court modified its opinion on rehearing on November 15, 1989, concluding that its categorization of Petitioner as a contingent beneficiary was not necessary to its holding that Wyoming law did not require notice. (App. B 2-3.) The court held that the Wyoming statute which requires notice to those beneficiaries

"named in the will" did not require notice to Shriners Hospitals because "any beneficiary of *a trust created in a will* is not a beneficiary of the will for purposes of the notice requirements" of Wyoming law. (App. B 3.) Although the majority of the court did not address the due process question, Justice Rooney dissented, for the reasons articulated in his and Chief Justice Cardine's earlier dissent. (App. B 4.)

REASONS FOR GRANTING THE PETITION

This Court has repeatedly recognized that the "elementary and fundamental requirement of due process" is notice to a party whose rights are about to be adjudicated. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). There is no more settled principle than the proposition that "notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable." *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 800 (1983).

This case presents the Court with an opportunity to reiterate the central role that notice and the right to be heard play within the due process framework. Specifically, this case provides the Court with a vehicle to declare that a trust beneficiary is constitutionally entitled to notice of proceedings adjudicating its interests when it is apparent that the trustee is laboring under a conflict of interest. In such instances a number of lower courts, and,

indeed, this Court in *Mullane*, have held that notice to the beneficiaries is required. The Wyoming Supreme Court's decisions of March 21, 1989, and November 5, 1989, in this matter are in direct conflict with those decisions.

On a practical level, there is a critical need for this Court to grant review and protect the interests of trust beneficiaries, in general, and charitable trust beneficiaries, in particular. The facts of this case demonstrate the great risks of abuse inherent in any system that does not provide a party—in this case the beneficiary—the opportunity to represent and protect its interests in a judicial proceeding.

I.

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION GUARANTEES A TRUST BENEFICIARY THE RIGHT TO NOTICE BEFORE A COURT APPROVES THE SALE OF ASSETS OBLIGATED TO THE TRUST IN A PROCEEDING IN WHICH THE BENEFICIARY'S INTERESTS ARE NOT ADEQUATELY REPRESENTED.

A party claiming that its rights to due process were violated must establish two central elements. It must establish, first it had a constitutionally protected interest in the matter at issue, and second, that the notice that it received, if any, was inadequate. Both of these propositions are unmistakably present in this case. The Petitioner had a constitutionally protected property interest at stake, yet because it was not given notice of the proceeding, it is clear that its interests were never represented before the Wyoming District Court.

A. As an ultimate beneficiary of the trust, Petitioner has a constitutionally protected property interest in the assets of the trust.

The Wyoming court's order permitting the sale of the Rife Ranch directly affected the Petitioner in two independent ways. First, it significantly decreased the value of the Petitioner's interest in the trust. Second, it diluted, and may have even extinguished, Shriners Hospitals' opportunity to recoup this lost value in a suit against the trustee for its mismanagement of the trust's assets. Either of these property interests is sufficient to trigger the protections of the Due Process Clause.

1. The order of the District Court in and for Sweetwater County, Wyoming approving the sale of the Rife Ranch significantly decreased the value of Petitioner's interest in the trust.

Immediately prior to the Wyoming District Court's order that the Rife Ranch be sold, Shriners Hospitals stood to receive a one-half interest of the Rife Ranch. The surface rights alone had been appraised at $1.2 Million. Upon sale of the Rife Ranch, Shriners Hospitals stood to receive a one-half interest of $820,000, 30% less than the appraised value of the surface rights of the Rife Ranch.[8] The record establishes that the Rife Ranch was intentionally sold by the co-personal representatives at a price that was well below its fair market value. Nonetheless, Shriners Hospitals was never afforded the opportunity to

[8] The 1985 appraisal of the property stated that "[w]ith the upsurge of oil and gas exploration in the area the past few years, there is currently a trend for owners/sellers to reserve unto themselves the mineral rights." (R. 266.) No such rights were reserved when the Rife Ranch was sold.

present its arguments against the private sale of the Rife Ranch. Indeed, Shriners Hospitals was not permitted to present evidence or take discovery even after the sale had been ordered. It was never even given an explanation by the Wyoming Supreme Court as to why Petitioner's due process objections did not prevail.[9]

This Court has recognized the obvious property interest that beneficiaries of a trust have in the assets of the trust. In *Mullane*, the Court struck down a New York statutory procedure through which trustees obtained judicial validation of the acts they had carried out during the preceding months. The flaw in the procedure was that the beneficiaries of the trust were not entitled to notice of the judicial proceeding, even though, as the Court recognized, the proceedings threatened to diminish the absent beneficiaries' property interests in the corpus of the trust. *Mullane*, 339 U.S. at 313. "Certainly," the Court noted, "the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up

---

[9] The Wyoming Supreme Court's silence on the due process issue suggests that it may have treated its conclusion that the statutes of Wyoming did not afford Petitioner the right to be notified as dispositive on the Petitioner's due process claim. Perhaps the Court was acting on the mistaken belief that the scope of a constitutional property interest is "defined by the procedures provided for its deprivation" by the state. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 541 (1985). This Court has, of course, repeatedly rejected this position, explaining that:

> it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct.

Id.

to the standards of due process." *Id.* Similarly, it is beyond question that Shriners Hospitals for Crippled Children's property interests were directly affected by the decree that the Wyoming District Court entered in its absence.[10]

2. The order of the District Court in and for Sweetwater County, Wyoming significantly decreased the value of Petitioner's potential cause of action against the trustee.

In addition to the effect of the judicial sale on Petitioner's interest in the Rife Ranch and the funds of the trust, the court order diluted, and may even have extinguished, Petitioner's opportunity to recover from the trustee for losses to the trust resulting from the sale of the Rife Ranch. This is due to the fact that the order approving the sale of the Rife Ranch may operate to insulate the trustee from attack. This Court's decisions in *Mullane* and in a number of more recent cases establish that this dilution of Petitioner's cause of action constitutes a deprivation of Petitioner's property which may not constitutionally be decreed in a proceeding of which it was never notified.

---

[10] Petitioner's interest in the property is enhanced by its established corporate policy of taking in kind substantial interests in farm and ranch real property that is given or devised to it. In line with this policy, Petitioner administers a substantial number of farm, ranch, and mineral properties in diverse locations through its professional managers. (R. 722-723.) This is directly contradictory to the co-personal representative's statement to the District Court that the Shriners Hospitals had no interest in ultimately operating the Rife Ranch. (R. 57.) Of course, because Petitioner had no notice of the judicial proceeding it had no way of apprising the court of its vast experience in administering property which should have been highly relevant to a determination of whether the trust would benefit from the sale of the Rife Ranch.

The traditional justification for allowing a trustee to manage the assets of a trust without the assent of the beneficiaries is that the beneficiaries retain the right to sue the trustee for mismanagement of trust assets. *See Dallas Dome Wyoming Oil Fields Co.* v. *Brooder*, 55 Wyo. 109, 97 P.2d 311 (1939) (recognizing this cause of action under Wyoming law). In some cases, the beneficiaries may even be able to have the wrongful act of the trustee set aside. *See generally* G. Bogert, *Trusts and Trustees* § 861 (rev. 2d ed. 1977). Parallel principles of trust law provide, however, that a beneficiary may be barred from bringing a cause of action against the trustee for management decisions which have been specifically approved of by court order. *See Restatement (Second) of Trusts* § 220 (1959); *Scott on Trusts* § 220 (4th ed. 1987); *Dennis* v. *Rhode Island Hosp. Trust Nat'l Bank*, 571 F.Supp. 623 (D.R.I. 1983), *aff'd*, 744 F.2d 893 (1st Cir. 1984).

Indeed, Respondents have already argued before the Wyoming Supreme Court that a Wyoming statute forbids any subsequent challenge to the District Court's order concerning the sale of the Rife Ranch. (R. 195-227.) Wyoming Statute § 2-7-620 provides that "[n]o proceedings for sale . . . by a personal representative of property belonging to the Estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the Court of jurisdiction." *Id.* In their brief before the Wyoming District Court, Respondents have also asserted that this provision bars the Petitioner from seeking any redress for the injuries it suffered by virtue of the sale. (R. 195-227.) Whether or not the statute absolutely bars a subsequent action against the trustee, it seems clear that the judicial decree approving the sale of the property may have some significant effect on Petitioner's cause of action against the trustee. Yet, despite

the possibility of such diminishment of its rights, Petitioner was never given notice of the proceeding.

As the Court recognized in *Mullane*, Shriners Hospitals may not be deprived of the property interest it has in its cause of action against the trustee except in accordance with the requirements of due process. Indeed, like *Mullane*, there are two distinct property interests to which the protections of due process apply in this case: the property interest in the trust and the property interest in the right to sue the trustee. As the Court observed in *Mullane*, in addition to the effect that the judicial proceeding could have on the corpus of the trust there, the proceeding threatened to "cut off the [beneficiaries'] rights to have the trustee answer for negligent or illegal impairments of their interests." 339 U.S. at 313.

The Court has recently had occasion to reaffirm the principle that potential causes of action constitute protected property interests. In *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U.S. 478 (1988), the Court held that an unsecured creditor's claim against an estate was entitled to constitutional protection, and explained that:

> Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. As we wrote in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), this question 'was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.'

485 U.S. at 485.

To be sure, the effect on a beneficiary's right of action against the trustee may be less dramatic here than in

Mullane.[11] Nevertheless, this Court has held that the government must comply with the dictates of due process whenever an individual's property interest may be subject to diminution even if it will not be extinguished in its entirety. In *Mennonite Bd. of Missions* the Court invalidated the judicial sale of real property which had been carried out in the absence of notice to a mortgagee. In holding that the mortgagee had a constitutionally protected property interest, the Court explained that the "tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." 462 U.S. at 798. Here, too, the judicial sale of the Rife Ranch has "immediately and drastically" diminished the value of the Petitioner's cause of action against the trustee for mismanagement. Like the property holders in *Mullane* and *Mennonite Bd. of Missions*, the Petitioner had a constitutional right to be notified of proceedings which could so dramatically affect its interests.

B. The trustee's participation in the sale of the Rife Ranch provided Petitioner no protection or representation and did not satisfy the dictates of due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be noti-

[11] Under the New York law involved in *Mullane* the rights that "beneficiaries would otherwise have against the trust company, either as trustee of the common fund or as trustee of any individual trust, for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated by the decree." 339 U.S. at 311.

fied.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972), quoting *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223 (1863). Here, Petitioner's property rights were most certainly affected when the Rife Ranch was sold at a well-below-market price and its right to challenge the trustee's acquiescence to the sale was diluted. It is clear, as well, that the Petitioner was never notified of the proceeding that affected its property rights in this fashion. The only conceivably open question, therefore, is whether the trustee's involvement in the proceeding obviated the need for notifying the named beneficiaries. Given the obvious conflict of interest of the trustee who also served as co-personal representative of the estate, it is clear that notice to the trustee was inadequate to satisfy constitutional due process and that the Wyoming Supreme Court's decisions must be overturned.

In *Mullane*, the Court acknowledged the general principle that the trustee often acts as "a resident fiduciary" and "as caretaker" of the beneficiaries' interest in the trust's property. 339 U.S. at 316. This general principle has traditionally provided the justification for empowering a trustee to litigate on behalf of the trust in the ordinary course of trust business. Yet, the Court in *Mullane* understood the need to look beyond the labels and official duties and to focus on the realities of the relationship between the trustee and beneficiary in the particular proceeding. Hence, the Court recognized that because of the trustee's strong personal interest in vindicating his actions, where the trustee seeks an accounting of the trust, its interests are adverse to those of the trust beneficiaries. "It is their caretaker who in the accounting becomes their adversary." *Id.* at 316. A trustee simply cannot adequately represent the interests of the trust beneficiaries where its own interests are adverse. Any notion that the trustee's representation in such situations is adequate is at

best a fiction, and at worst a sham. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Id.* at 315.

Here, as in *Mullane*, there is a serious conflict of interest between the trustee and the beneficiaries. To begin with, as co-personal representative of the estate, First Security Bank of Utah was *required* to promote the interests of the legatees and pay the debts and administrative expenses (including its own fees). By contrast, in its capacity as trustee of the testamentary trust, the First Security Bank of Utah was *required* to consider only the respective interests of the income beneficiary and charitable remaindermen of the charitable unitrust.[12] Because of the clear divergence of interests between these two constituencies, it was obviously impossible for the First Security Bank of Utah to satisfy both of its duties.

First Security Bank of Utah's conflict of interest went deeper than this. The petition for the sale of the Rife Ranch,

---

[12] The vice-president of the First Security Bank of Utah alleged a conflict existed between the income beneficiary and the remaindermen here. In an affidavit presented to the Wyoming court, the Vice President and Trust Officer of the First Security Bank of Utah alleged that he had numerous discussions with the life beneficiary, Mrs. Mork (age 81), who "consistently stated that her preference was for a sale of the Rife Ranch as expeditiously as possible so that the trust would have funds to invest *for her benefit as the income beneficiary*." (R. 499.) (emphasis added). This one-sided approach to administration of the trust is incongruous with that balanced investment plan contemplated by Velma Rife Jones ("Investment need not be diversified and may be made or retained with a view to possible future increase in value, notwithstanding the amount or absence of income therefrom.") (R. 18.) This tension between the life beneficiary's interest in immediate income and the petitioner-remainderman's long-term interests provides a classic example of a case in which the trustee cannot possibly represent all divergent interests.

filed by the co-personal representatives, stated that the sale was necessary to "pay the costs of administration of the estate." (R. 57.) The trustee representing the interests of the beneficiaries was duty bound to question this assertion, that is to determine, whether the assets of the trust were being diminished by unreasonable administrative costs and whether the sale was in fact necessary to serve its purported ends. Of course, the trustee in this case, the First Security Bank of Utah, was not about to engage in any of this scrutiny, for it, itself, was one of the entities proposing the sale and at the same time receiving fees for administering the estate. It is farcical to conclude that the First Security Bank of Utah's involvement as trustee afforded Petitioner any meaningful protection against the improper actions of the First Security Bank of Utah as co-personal representative.

Many courts have recognized the fallacy of assuming that a trustee who is laboring under a conflict of interest can adequately protect, or provide "virtual representation" for, the interests of the beneficiary. Some of these courts have premised their decisions on constitutional due process, but most have cut the analysis off before reaching the constitutional issue by holding that the absent beneficiaries are indispensable parties to the proceeding,[13] or by holding that state law otherwise requires notification to the beneficiaries. For example, in *Hansen* v. *Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979), the income beneficiary of a spendthrift trust had brought an action seeking dissolution of the trust. The plaintiff's chil-

[13] It has been recognized that the prejudice element of the indispensable party inquiry has a distinct due process component. *See generally* 7 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1602, at 21-22 (1986).

dren, who were destined to receive the trust after the plaintiff's death, objected to the termination of the trust. The Seventh Circuit held that the children were indispensable parties to the action because they stood to lose so much and because no one who was party to the action, including the trustee, was representing their interests. The Court explained that "[a]lthough cases have found a trustee adequate to represent the interests of beneficiaries in suits brought on behalf of the trust against third parties, this should not hold true in a contest essentially between the remaindermen and the income beneficiaries of a trust." *Id.* at 1153. *See also Koch* v. *Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987) (children are indispensable parties when there is a conflict of interest between their interest and the interest of their guardian).

Similarly in *Wichita and Affiliated Tribes of Okla.* v. *Hodel*, 252 U.S. App. D.C. 140, 788 F.2d 765 (D.C. Cir. 1986), the court held that an Indian tribe could not sue the United States for distribution of a trust unless all other beneficiaries of the trust were made parties to the action. The court acknowledged the general principle that the United States, in its capacity as trustee, typically is capable of representing Indian interests, but also recognized that in the case before it:

> whatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes involved in the case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interest of the United States and the interest of Indians, representation of the Indians by the United States is not adequate.' *Manygoats* v. *Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977); *see also New Mexico* v. *Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121, 975 S. Ct. 1157, 51 L.Ed.2d 572 (1977); *Hansen*

v. *Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979).

252 U.S. App. D.C. at 150, 788 F.2d at 775.

Other courts have deemed the representation of a conflict-ridden trustee invalid on general state law grounds, although these decisions have been based on identical factors to those that make up the due process inquiry. The facts of one such case, *Azarian* v. *First Nat'l Bank of Boston*, 383 Mass. 492, 423 N.E.2d 749 (1981), are quite similar to the facts of the case at bar, although the holding of the Wyoming Supreme Court is thoroughly at odds with the holding of the Supreme Judicial Court of Massachusetts. Much like the instant case, the executor of the estate in *Azarian* sought allowance of accounts in the state court and the trustees of the trust which received the residue of the estate did not object. Furthermore, just as in the instant case, the actual beneficiaries of the trust in *Azarian* were never provided notice of the proceeding. Most significantly, just as in the instant case, one of the trustees who approved of the executor's accounts was the executor itself.[14] Unlike the Wyoming Supreme Court below, however, the Supreme Judicial Court of Massachusetts recognized the grave dangers this situation presented to the beneficiaries: "It is common ground that an accounting executor cannot bind the beneficiaries of the trust by his assent as trustee to his own account as executor." 383 Mass. at 494, 423 N.E.2d at 750. Hence,

[14] Indeed, the case at bar presents a more egregious illustration of the risk of abuse than *Azarian*. In *Azarian* other trustees who were not laboring under a conflict of interest also approved of the executor's accounts. In Petitioner's case the proposed sale of the Rife Ranch was not approved by any trustee who was not operating under a conflict of interest.

that Court declared that "justice will be served if the matter is reopened to give the beneficiaries their day in court." 383 Mass. at 494, 423 N.E.2d 751. *See also In the Matter of the Estate of Wiswall*, 11 Ariz.App. 314, 321, 464 P.2d 634, 641 (1970) ("Despite a trend favoring trustee representation, in civil actions, a trustee is not permitted to represent a beneficiary where the two have conflicting interests."); and G. Bogert, *Trusts & Trustees*, § 593, at 423-425 (2d rev. ed. 1977) ("where the trustee has an interest adverse to that of the beneficiary, . . . the beneficiaries must be brought into the action.")

Because they have required notice to the beneficiaries on state-law grounds, informed by the Court's decision in *Mullane* and other due process cases, these courts have not needed to rely directly on the Due Process Clause of the Fourteenth Amendment. Nevertheless, some courts have based their decisions on the Due Process Clause. For example, in *Estate of Lacy*, 54 Cal.App. 3d 172, 126 Cal.Rptr. 432 (1975), the court invalidated an accounting proceeding in which the remainder beneficiaries of a trust had not been provided actual notice. Although the remainder beneficiaries were "represented" by their mother, who had been appointed guardian *ad litem* for them, the court held that the mother could not adequately represent the children because of her conflicting interest as a life beneficiary of the trust. The court noted that "the grounds of contest alleged show that, as a matter of law the remaindermen are asserting issues directly contrary to the interests of the income beneficiaries." 54 Cal.App. 3d at 185, 126 Cal.Rptr. at 441. Relying on *Mullane*, and a number of California decisions, the court held that notice to the individual remaindermen was necessary if their addresses were known. *See also In re Trust Created by Hormel*, 282 Minn. 197, 163 N.W.2d 844 (1968) (due process

required joinder of the beneficiaries). Of course, the most critical decision requiring notice to beneficiaries as a matter of due process is *Mullane* itself.[15]

The foregoing discussion of the serious conflict between the First Security Bank of Utah's responsibilities as both co-personal representative and as trustee (not to mention its direct financial interests) reveal that it is imperative that this Court review the Wyoming Supreme Court's ruling in order to restore stability to this area of law, and to ensure that trust beneficiaries will be provided the protection that the Constitution affords them. Simply put, because of the conflict of interest that has been discussed above, there is no doubt that Petitioner's interests were not represented before the Wyoming court.

If any doubts remain about the need for review, however, they are surely erased once the potential impact of the proceeding on Petitioner's potential cause of action against the trustee is taken into consideration. For there can be no more blatant conflict of interest than where, as here, the party who ostensibly protects the interests of the beneficiaries is by virtue of his own actions, diluting the beneficiaries' potential cause of action against him. As the Court recognized in *Mullane*, in this type of case the supposed "caretaker" is, in fact, the actual "adversary." 339 U.S. at 316.

The effect that financial self-interest has on the due process analysis has been noted by this Court in a variety of contexts before and after *Mullane*. Whether deal-

---

[15] In virtually all respects this case is directly controlled by *Mullane*. Indeed, the conflict between *Mullane* and the case at bar is so great that it may be appropriate for this Court to summarily reverse the judgment of the Wyoming Supreme Court.

ing with the mayor-judge in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), who retained one-half of any fines that he imposed, or the members of the Board of Optometrists in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), who stood to benefit from disciplining competitors, or the Alabama Supreme Court Justice in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), whose pending suit would benefit from his ruling in a case before him, this Court has never closed its eyes to the risks that those in positions of trust might not be able to resist the "possible temptation" to put their own interests before their legal duties. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

Three terms ago the Court heard oral arguments in a case that applied some of these concerns to the role of a trustee. In *United Retail and Wholesale Employees* v. *Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd* by an equally divided Court *sub nom. Pension Benefit Guarantee Corp.* v. *Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987), the Court of Appeals held that a withdrawing employer's due process rights were violated by a statute that allowed the trustees of the multi-employer pension plan to determine the withdrawing employer's liability to the fund. The Third Circuit recognized the conflict of interest between the desire of the trustees to increase the funds in the pension plan pool, and the duty to objectively adjudicate the withdrawing employer's liability. This case presents the Court with an opportunity to revisit some of these issues that were left undecided because of the division of the court in *Yahn & McDonnell*.

As Chief Justice Cardine put it, dissenting in this case: "one cannot help but wonder, why not give notice of the sale to the named beneficiaries." (App. A 10.) Perhaps the sale of the Rife Ranch was part of a scheme to benefit the purchasers and to hoodwink the Petitioner. Or per-

haps it was an effort by the personal representative to ignore the interests of the Petitioner. Or, perhaps the sale simply reflected a lack of concern by the co-personal representatives and trustee for the interests of Shriners Hospitals. After all, Petitioner did not even know that Mrs. Jones had created the trust for its benefit until after the sale was ordered.[16] Thus, one of the parties whose interest were most at stake was never permitted the opportunity to investigate or challenge the reasonableness of the sale. More process than this was clearly due.

II.

THE QUESTION IS SUBSTANTIAL

The Due Process issue in the instant case is fundamental to the diligent and faithful administration of charitable remainder trusts created by decedents. Major American charities like Shriners Hospitals For Crippled Children are the remaindermen of trusts administered in every state. The Internal Revenue Service advises that over 36,000 charitable remainder trusts filed federal tax returns in 1988. Although no figures are available for charities

[16] The position of Shriners Hospitals is quite different from that of the other charitable remainderman, the University of Utah. Prior to proposing the sale of the Rife Ranch, the Vice-President of First Security Bank of Utah had discussed the sale with the Executive Director of the University of Utah Office of Development, who indicated the University's reluctance to manage the land. (R. 499.) Such informal consultations were conducted by the Vice-President of First Security Bank of Utah with the life income beneficiary, the six individual legatees, and the University of Utah. Shriners Hospitals was the only interested party who was not consulted concerning the sale. One can only speculate as to whether Shriners Hospitals was kept in the dark because of some animus, or because of a suspicion that Shriners Hospitals would express interest in maintaining the Rife Ranch.

generally, the Council for Aid to Education estimates that known gifts of charitable remainder interests to approximately 1,500 private educational institutions amounted to roughly $1.8 billion in the period 1977 through 1988, or about 5.9 percent of all gifts by individuals to such institutions.[17] A recent sampling of 15 bank and trust companies revealed that they serve as trustees for 3,125 charitable remainder trusts, with assets totalling $727,358,347.[18] Petitioner alone has interests in over 2,300 trusts of which it is aware, with its share of assets totalling approximately $70 million.

The experience of Petitioner is that many state laws and rules do not require the personal representative of an estate or trustee of a charitable remainder trust to give notice to the charitable beneficiary of the implementation and funding of the trust. The result is that there are countless charitable remainder trusts under administration, with likely assets in the billions of dollars, of which the charitable beneficiaries have no knowledge. Petitioner and other charitable beneficiaries have no opportunity to know of such trusts, much less demand an accounting, or to seek redress from the fiduciary where nonfeasance or misfeasance occurs. As a result, testamentary charitable remainder beneficiaries are particularly susceptible to having their interests in the trusts diminished significantly by the actions of the personal representatives of the estates and/or the trustees. The personal representatives may fund the trusts with unwanted or un-

---

[17] Council for Aid to Education, *Voluntary Support of Education 1987-1988*, at 7 (June 1989). The amount is slightly overestimated because it includes a small amount of life income gift annuities.

[18] E.G. Estes, *Managing Charitable Assets*, Fund Raising Management (Feb. 1990), at 26-36.

qualified assets or, as here, sell assets otherwise destined for the trusts at below fair market value. Moreover, the personal representatives may take any of a myriad of other actions which adversely affect the charitable beneficiaries' interests in the trusts. The requirements of due process frequently constitute the only mechanism by which charitable remaindermen can ensure that their interests are protected.

CONCLUSION

For the reasons stated, Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD F. RUBERRY
Counsel of Record
CARLOS DEL CARPIO
TIMOTHY J. HARRIS
BOLLINGER & RUBERRY
54 West Hubbard Street
Suite 500
Chicago, Illinois 60610-4620
(312) 527-1001

Attorneys for Petitioner,
Shriners Hospitals
for Crippled Children

APPENDICES

APPENDIX A

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),
v.
FIRST SECURITY BANK OF UTAH, N.A., Personal Representative, First Security Bank of Rock Springs, Resident Personal Representative; Rock Springs Grazing Association; Lazy VD Land and Livestock; Elza Eversole; and Lois M. Eversole, Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.

March 21, 1989.

Contingent beneficiary of testamentary trust established in will sought to set aside sale of estate property. The District Court, Sweetwater County, Kenneth G. Hamm, J., denied motion, and appeal followed. The Supreme Court, Brown, J., Retired, held that contingent beneficiary of testamentary trust was not entitled to individual notice of proposed sale of estate asset.

Affirmed.

Cardine, C.J., dissented and filed an opinion in which Rooney, J., Retired, joined.

Rooney, J., Retired, filed dissenting opinion in which Cardine, C.J., joined.

* * * * *

Before CARDINE, C.J., THOMAS and MACY, JJ., ROONEY and BROWN, Retired, JJ.

BROWN, Justice, Retired.

Appellant Shriners Hospitals for Crippled Children (Shriners), a contingent beneficiary of a testamentary trust

established in the will of Velma Rife Jones, sought relief under W.R.C.P. 60(b) from an order authorizing and confirming the sale of estate assets. The district court denied the motion and Shriners appeals.

Shriners states the issues to be:

1. Whether Appellant has standing to claim relief under W.R.C.P., Rule 60(b).

2. Whether the District Court has the authority under W.R.C.P., Rule 60(b) to set aside the conveyance made pursuant to its Order Approving Sale Of Real Property And Confirmation Of Sale entered May 19, 1987.

3. Whether failure of Co-Personal Representatives to give Appellant the notice mandated by Wyo. Stat. (1977), §§ 2-7-615 and 2-7-205(b) nullifies the District Court's Order and Personal Representatives' Deed dated May 19, 1987.

4. Whether the purported sale of May 19, 1987 can be set aside because it was unnecessary and not in Appellant's best interest.

5. Whether it was reversible error for this Court to cut-off Appellant's discovery and to deny Appellant the opportunity for a full and fair hearing of its claim under W.R.C.P., Rule 60(b).

Answering the following question, similarly posed in Issue No. 3, effectively disposes of all the issues raised by Shriners: Is a contingent beneficiary of a testamentary trust entitled to separate and individual notice of a proposed sale of an estate asset in addition to notice given to the trustee? We answer that question in the negative and affirm the trial court.

Velma Rife Jones, a Utah resident, died testate on October 19, 1986. Her will contained specific bequests to several named cousins, if they survived her, and the residuary estate was left to appellee, First Security Bank of Utah, N.A., as trustee of a testamentary trust. Darrell

Rife Mork, the decedent's sister, was named as lifetime beneficiary of the trust income, with the remainder to Shriners and the University of Utah if they qualified as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code.

The assets of the estate included a Wyoming ranch, and the will was consequently admitted to ancillary probate in Wyoming. Appellees, First Security Bank of Utah and First Security Bank of Rock Springs, were appointed co-personal representatives. Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, and Elza Eversole were interested in buying the ranch, which was appraised at $1.2 million in 1985, and was reappraised at $925,000 in August, 1987. They formed a joint venture called Southern Wyoming Cattle Company and made a cash offer of $820,000 to the co-personal representative, First Security Bank of Utah. The trust officer made minor modifications to the offer and Southern Wyoming Cattle Company accepted those terms.

The co-personal representatives filed a petition for authority to sell the real property as required by W.S. 2-7-614 (July 1980 Repl.). The asserted reasons for the sale were that

> the Estate is in need of liquid assets to pay the debts, specific bequests, costs of administration and taxes of the Estate and that the ultimate beneficiary of the Estate (a trust for the benefit of Darrell Rife Mork, the sister of Velma Rife Jones during her lifetime and then after her death two charities) has no desire to own or operate the Rife Ranch.

The petition further stated that

> [t]here has been filed herein Waiver of Notice of hearing of the above matter by the only beneficiaries of the Estate of Velma Rife Jones, Deceased, and Petitioners believe that no notice of the hearing of the Petition needs to be given.

Attached to the petition were waivers of notice executed by the recipients of the five specific will bequests and First Security Bank of Utah as trustee of the testamentary trust.[1] No notice was given to Shriners or the University of Utah. On May 19, 1987, the court entered an order approving and confirming the sale.

On July 6, 1987, Shriners filed a W.R.C.P. 60(b) motion for relief from the order, requesting the court to set aside the sale and declare it void. Shriners asserted that the failure to provide notice to the contingent beneficiaries or remaindermen violated the statutory notice requirements. The relevant notice statutes provide:

> Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and *the personal representative shall give notice of the hearing as provided in W.S. 2-7-205*, * * *. At the hearing and upon satisfactory proof the court may order the sale, mortgage, exchange, pledge or lease of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

W.S. 2-7-615 (July 1980 Repl.) (emphasis added).

> Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, *2-7-615*, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the date of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to *all of the beneficiaries named in the will of a decedent dying testate.*

W.S. 2-7-205(b) (July 1980 Repl.) (emphasis added).

---

[1] The waiver from the bank initially states that First Interstate Bank of Utah is waiving notice. This no doubt is a typographical error.

Shriners asserted that it was one of the "beneficiaries named in the will" and was therefore entitled to notice. In response, the co-personal representatives argued that Shriners, as a trust beneficiary, was not entitled to notice, that Shriners was not entitled to file a motion for relief under W.R.C.P. 60(b), and that the motion for relief was an impermissible collateral attack on the district court's order. In disposing of the motion, the district court did not address the question of whether Shriners was one of the "beneficiaries named in the will" as that term is used in W.S. 2-7-205(b). Instead, the court relied on W.S. 2-7-620 (July 1980 Repl.), which provides:

> No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction.

Relying on *Hartt v. Brimmer*, 74 Wyo. 338, 287 P.2d 638 (1955) and *Security-First National Bank of Los Angeles v. Superior Court of Los Angeles County*, 1 Cal.2d 749, 37 P.2d 69 (1934), the district court concluded that the estate administration was an in rem proceeding and, because the court had jurisdiction over the property and the personal representative, failure of notice to Shriners was not a jurisdictional defect. In addition, the court apparently concluded that Shriners' motion constituted a collateral attack concerning a non-jurisdictional matter. Shriners appeals from the denial of its W.R.C.P. 60(b) motion.

Although our legal analysis of the issues in this case differs from that employed by the trial court, the end result is the same.

Shriners contends that it is a beneficiary under the will and that its interest is vested, rather than contingent, and as a vested beneficiary it was entitled to notice of the

proposed sale of an estate asset. In support of this reasoning, Shriners cites *In re Potter's Estate*, 396 P.2d 438 (Wyo. 1964); *McGinnis v. McGinnis*, 391 P.2d 927 (Wyo. 1964); and W.S. 2-7-402, 2-7-615 and 2-7-205. The cases cited by Shriners do not support its contentions.

Potter's Estate involved, among other things, the question of the vesting of real property in the heirs at law of a decedent who died intestate and the necessity of selling estate property. In that case, this court stated that "[o]nly the executor, administrator, spouse, next of kin, heirs, legatees, devisees, and creditors of the deceased or of the administration are parties interested in the estate." *In re Potter's Estate*, 396 P.2d at 447.

In support of its contention that it is a vested beneficiary or vested remainderman, Shriners cites *McGinnis*. That case has nothing to do with determining the nature of Shriners' interest. In *McGinnis*, a family owned a ranch and in 1941 assigned the oil and gas royalties in trust to a bank. In 1956, one family member received royalty payments and refused to pay the royalties to the trustee. The rest of the family sued the relative, and he defended on the grounds that the assignment was illegal on the basis of the "rule against perpetuities," and that it was an unreasonable restraint on alienation. This court held the trust was valid. Neither *McGinnis* nor *Potter's Estate* involves notice or lack of notice to contingent beneficiaries or contingent remaindermen and has no relevancy in the case before us.

Clearly Shriners' interest in the trust property is not vested. "[A] vested remainder is one which is limited to a person in being, whose right to the estate does not depend on the happening or failure of any future event. *Safe Deposit & Trust Co. v. Bowse*, 181 Md. 351, 29 A.2d 906 [(1943)]. 8 Maryland L.Rev. 142." 28 Am.Jur.2d Estates,

§ 242, n. 6 (1966). There is at least one future circumstance that would prevent Shriners from ever receiving any benefits under the trust—if, at the time of the death of the life beneficiary of the trust, Shriners is not an "organization described in Section 170(c) and Section 2055(a) of the Internal Revenue Code of 1954 as amended * * *." The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a "beneficiary named in the will."

W.S. 2-7-402 (July 1980 Repl.) states in pertinent part:

> Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However, all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, * * *."

Under W.S. 2-7-402, title to decedent's property passed to the person to whom it was devised. In this case it passed to First Security-Utah, as trustee, not Shriners or the University of Utah.

W.S. 2-7-615 requires that notice of the hearing for the sale of real property to be given as provided in W.S. 2-7-205 (July 1980 Repl.) "to all of the beneficiaries named in the will of a decedent dying testate." W.S. 2-7-615 and 2-7-205 in combination simply provide that notice of a hearing for the sale of estate property be given to "beneficiaries named in the will of a decedent dying testate." In this case, the beneficiary named in the will is the First Security Bank of Utah, not Shriners or the University of Utah. Shriners and the University of Utah are contingent beneficiaries under the testamentary trust established by

decedent. Coincidentally, the terms of the will and the trust are set out in the same instrument, but each has independent life without regard to the other. Stated another way, the will is not dependent on the trust for its legal existence nor is the trust dependent on the will. Shriners cannot "bootstrap" its status as a contingent beneficiary under the trust to a beneficiary under the will just because the terms of the will and the terms of the trust are set out in the same instrument. Furthermore, just because the testator of the will and the trustor or settlor of the trust is the same person does not make the beneficiary of the trust also the beneficiary "named in the will."

Limiting the requirements of notice to the beneficiaries named in the will, as required by W.S. 2-7-205 and as we have done here, has practical significance. If the contingent beneficiaries of the trust were a large group of persons, an intolerable burden on the administration of the estate would develop and lead to expensive, endless and needless litigation if notice of the sale of an estate asset need be given to each individual contingent beneficiary under the testamentary trust.

Our holding in this case is simply that a contingent beneficiary of a testamentary trust is not entitled to individual notice of the proposed sale of an estate asset. This holding makes it unnecessary to address other issues raised by Shriners.

Affirmed.

CARDINE, C.J., files a dissenting opinion in which ROONEY, Retired J., joined.

ROONEY, Retired J., files a dissenting opinion in which CARDINE, C.J., joined.

CARDINE, Chief Justice, dissenting, with whom ROONEY, Justice, Retired, joins.

I would reverse.

On the issue of notice, Shriners advances two arguments. First, it asserts that it is one of the "beneficiaries named in the will" as that term appears in W.S. 2-7-205(b). Second, it argues that, because of its property interest in the estate, notice is required by the Due Process Clause of the United States Constitution. I would hold that appellant is correct on both counts. Shriners, however, was a "beneficiary" named in the will, and that alone was sufficient to require notice.

It is quite astonishing that the court concludes that contingent beneficiaries are not beneficiaries and therefore not entitled to notice of disposition at private sale of a significant asset. Even more astonishing is the suggestion that a will containing trust provisions is not a will or that trust provisions in a will are not part of the will. The instrument involved here is titled "Last Will and Testament of Velma Rife Jones." Within the body of the instrument is established a trust in which appellant is a named beneficiary. There is no settled law of which I am aware that permits the court to hold that what it does not like in a will simply is not in the will.

To complete this strange circle of result justification is the suggestion that some policy is served by denying notice because contingent beneficiaries may be "a large group of persons" and notice to them would be "expensive," an "intolerable burden" and lead to "endless * * * litigation." And so for expediency, the court approves this sale without the beneficiary, in whom title may ultimately vest, receiving notice or having the right to be heard. The result in this case was sale of a ranch first appraised for $1,200,000 being sold for the sum of $820,000. Perhaps the amount received for sale of the ranch was reasonable.

But one cannot help but wonder, why not give notice of the sale to named beneficiaries.

The Wyoming probate code does not define the term "beneficiaries." When construing statutes, however, "[w]ords and phrases shall be taken in their ordinary and usual sense" and "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." W.S. 8-1-103. In its ordinary and usual sense, the term "beneficiary" means "one who receives something." Webster's Third New International Dictionary (1971). In law, "beneficiary," standing alone, is defined as "[o]ne who benefits from [the] act of another." Black's Law Dictionary (5th ed. 1979). Shriners surely receives something and benefits from the act of the testatrix, Velma Rife Jones. If it meets the qualifications set forth in the will, it is entitled to a remainder interest in the estate. In addition, Shriners is unquestionably "named in the will." Notice, therefore, was required by W.S. 2-7-615 and 2-7-205(b).

ROONEY, Retired Justice, dissenting, with whom CARDINE, C.J., joins.

I join in the dissent of Chief Justice Cardine. In addition to that said by him, I note that this is a *testamentary* trust. Contrary to that said in the majority opinion, it does not have any "independent life without regard to" the will, and it *is* "dependent on the will [for its legal existence]." Appellant benefits only because of the will, albeit through a trust established therein. As expressly set forth in the will, the intent of the testator was to benefit the appellant—not the trustee. Appellant was a beneficiary named in the will as provided in W.S. 2-7-615.

It would serve no purpose to address in this dissent the other issues presented in this case which become pertinent once appellant is recognized to be a beneficiary under the will. Whether or not I would find reversible error therein is not important.

APPENDIX B

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),
v.
FIRST SECURITY BANK OF UTAH, N.A., Personal Representative, First Security Bank of Rock Springs, Resident Personal Representative, Rock Springs Grazing Association; Lazy VD Land and Livestock; Elza Eversole; and Lois M. Eversole, Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.

Nov. 15, 1989.

On Rehearing of Appeal from the District Court of Sweetwater County; Kenneth G. Hamm, Judge.

* * * * *

Before CARDINE, C.J., THOMAS, MACY and GOLDEN, JJ., and ROONEY, J., Retired.

ORDER DENYING PETITION FOR REHEARING AND CONFIRMING PRIOR DECISION

CARDINE, Chief Justice.

This case came on before the Court upon the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, filed on April 5, 1989; Appellant's Brief in Support of Petition for Reargument and Rehearing, filed April 5, 1989; Appellant's Supplemental Brief upon Rehearing Pursuant to the Court's Order Dated April 21, 1989, filed May 18, 1989; Answer of Appellees, Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole to

Petition for Reargument and Rehearing of Appellant, filed May 19, 1989; Brief on Rehearing of Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole, filed May 19, 1989; Answer and Supporting Brief on Rehearing of Appellees First Security Bank of Utah, N.A. and First Security Bank of Rock Springs, filed May 22, 1989; and Brief of Amicus Curiae University of Wyoming upon Rehearing, filed May 22, 1989; and the oral argument of counsel, and the Court, having reviewed the file and record of the Court and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), finds and holds that:

The primary interest of the University of Wyoming as amicus curiae is expressed in its statement of the issue as follows:

> "1. Whether the property interest of the remainderman of a charitable remainder trust is a contingent interest or vested interest subject to complete defeasance."

The Shriners Hospitals for Crippled Children also expressed concern about its categorization as a contingent beneficiary.

The Court is of the opinion that the prior decision of the Court should be confirmed insofar as it is expressed in the essence of the ratio decidendi:

> "The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a 'beneficiary named in the will.' " *Matter of Estate of Jones*, 770 P.2d at 1103.

The Court now is of the opinion that the description of the Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries of the testamentary trust is not a material concern with respect

to the disposition of this case. Consequently, the Court withdraws that categorization and those portions of the prior opinion that seem to depend upon, or discuss, the status of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The Court understands that the requirement in the testamentary trust that those beneficiaries qualify as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code is verbiage that is necessary to assure that the trust will be treated as a charitable remainder trust by the Internal Revenue Service. Consequently, it would appear that the point made by the University of Wyoming as amicus curiae that these beneficiaries should be perceived as vested beneficiaries whose interest may be defeated by the loss of their status as a charitable organization is sound and should be respected. We do not deem it necessary to so hold, however, any more than we now deem it to have been necessary to identify Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a "beneficiary under the will."

IT, THEREFORE, IS ORDERED that the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, be, and the same hereby is, denied, and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), is confirmed except that it is modified to withdraw therefrom any categorization of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

ROONEY, Justice, Retired.

I would have granted the petition for the reasons set forth in my dissent and in the dissent of Chief Justice Cardine.

APPENDIX C

(Letterhead Of)

THE STATE OF WYOMING
THIRD JUDICIAL DISTRICT

August 27, 1987

Mr. Calvin E. Ragsdale
Attorney at Law
20 East Flaming Gorge Way
Green River, Wyoming 82935

Mr. Henry A. Burgess
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Mr. Michael J. Finn
Attorney at Law
P.O. Box 1152
Rock Springs, Wyoming 82902

Mr. Robert James Wyatt
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

Section 2-7-620, W.S. 1977 provides:

> "No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction."

Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, et al., 37 P.2d 69 (Cal. 1934) seems particularly pertinent here, and I quote at some length from it:

> Will, supra; In re Lane's Estate, supra. The situation here presents at most a defect or irregularity in the service of the requisite notice."

As counsel notes:

> "The situation in the case at bar is nearly identical to *Hartt*. The only difference is that the activity at issue in the case at bar is a sale of estate property rather than admission of a will to probate. It is axiomatic that the sale of estate property is an in rem proceeding. Thus the factual difference between *Hartt* in the case at bar is of no import."

It is also clear that the Court had subject matter jurisdiction inasmuch as district courts have jurisdiction over probate matters, and also that the Court had jurisdiction over the real property and the personal representative.

Furthermore, as noted in Hartt, supra, whether the attack is collateral or direct is immaterial. The Court said, on page 654:

> "The authorities are divided on the question as to whether an action in equity to set aside a judgment or an order is a direct or a collateral attack. 31 Am. Jur. § 614, p. 206. The author of the Annotation in L.R.A. 1918D, 470 seems inclined to the view that it is a direct attack. See Poston v. Delfelder, 39 Wyo. 163, 270 P. 1068, 273 P. 176, on rehearing. We need not decide the point. *We think it makes no difference which view is taken so far as this case is concerned. The probate proceedings involved were proceedings in rem. The court had jurisdiction to enter the order admitting the will to probate. There was at most a defect or irregularity in the process. As we have seen, courts of equity are, to say the least, ordinarily hesitant to set aside a judgment for mere irregularity in the process,* see also 34 C.J.S., Executors and Administrators, §§ 527, 528, pp. 447, 448, note 92, and will not do so if the attack thereon is

> not made promptly and so belatedly as in the case at bar. The effect is the same as though the attack were collateral. See Poston v. Delfelder, supra, on rehearing. We do not say what should be the rule if a case of real hardship should be presented. We have no such case before us. We think the result herein should be the same even if we do not consider the probate court to be distinct from the district court."

It is questionable that the giving of notice to Shriners Hospital would have made any difference whatsoever. The original offer to buy was made April 28, 1987, a counter-offer made April 30, 1987 and accepted May 1, 1987. The petition for authority to sell was filed May 19, 1987, the sale was confirmed May 19, 1987, and on the same day various deeds were executed and delivered. It was not until July 6, 1987 that the Motion for Relief was filed by Shriners and only shortly before that that the alleged prospective purchaser disclosed that he was willing to pay a higher price for the property. Therefore, had Shriner been told of the pending sale for $820,000.00, it would not have had before it any other offer to consider. The University of Utah, on July 20, 1987, joined with Shriners' motion, yet the executive director of the University, on July 23, 1987, wrote the vice-president of the First Security Bank saying "It was wonderful news about the selling of the Wyoming property. I appreciate you keeping me informed."

There is some suggestion in the file that possibly the First Security Bank may have been remiss in failing to seek out other possible buyers. If that is so, perhaps Shriners' best remedy is to sue the bank for damages.

I regret that I have not addressed all of the issues presented in counsels' excellent briefs as is my general custom, but I am inundated at the moment, and feel that

the above approach resolves the problem. However, I also adopt by this reference all other legal arguments and principles submitted by counsel for the purchasers and the First Security Bank, in support of their position to the extent they are applicable. Shriners' counsel is also reminded that all briefs are required to be on 8 ½ x 11 paper by Rule 403 of the Uniform Rules for the District Courts.

Mr. Ragsdale will please prepare an order denying the Motion, send a copy to Mr. Burgess and Mr. Finn and the original to me for signature.

By The Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

C7

November 4, 1987

Mr. Calvin E. Ragsdale
Attorney at Law
20 East Flaming Gorge Way
Green River, Wyoming 82935

Mr. Henry A. Burgess
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Mr. Michael J. Finn
Attorney at Law
P.O. Box 1152
Rock Springs, Wyoming 82902

Mr. Robert James Wyatt
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

The opinion I write on the above matter, dated August 27, 1987, was based upon a point of law. That point of law was that the proceedings concerning the sale of the property could not be collaterally attacked. Therefore, as I saw it then and see it now, further discovery will not change that point of law. Pace v. Hadley is not applicable as far as this case is concerned.

Accordingly, movants Objections To Proposed Order Denying Motion For Relief From Order Under Wyoming Rules of Civil Procedure, Rule 60(b) of Shriner's Hospitals For Crippled Children are denied.

By The Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

APPENDIX D

U.S.C.A. Const. Amend. 14

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-202. Public auction of real or personal property; contents.

(a) When a sale or real or personal property of a decedent is ordered and is to be made at public auction, notice of the time and place of sale shall be published in a daily or weekly newspaper of general circulation in the county in which the probate is pending and in the county in which such property is situated once a week for three (3) consecutive weeks next before the sale, except in the case of perishable and other personal property likely to depreciate in value or which will incur loss by being kept, and as much other personal property as may be necessary to pay the allowance made to the family of the decedent.

(b) Notice shall set forth the time and place of sale and a description of the property offered for sale, and may provide that any and all bids may be rejected by the personal representative.

(c) A copy of the notice shall also be mailed as provided in W.S. 2-7-205.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-205. Parties entitled to receive.

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper; and

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper.

(b) Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-615, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(c) Notice of all intended sales of real property not requiring an order of the court shall be mailed or delivered not less than ten (10) days prior to the sale to the surviving spouse, if any, and to the heirs of a decedent dying

intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1; 1989, ch. 114, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-614. Petition to sell, etc.; generally.

A petition to sell, mortgage, exchange, pledge or lease any real or personal property shall set forth the reasons for the petition and describe the property involved. It may apply for different authority as to separate parts of the property, or it may apply in the alternative for authority to sell, mortgage, exchange, pledge or lease. Whenever it is for the best interests of the estate, real and personal propety of the estate may be sold, mortgaged, exchanged, pledged or leased as a unit.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-615. Petition to sell, etc.; notice and hearing; exception; court order.

Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and the personal representative shall give notice of the hearing as provided in W.S. 2-7-205, but as to personal property and as to the lease of real property not specifically devised for a period of not to exceed one (1) year, the court may hear the petition without notice. In those instances where notice is required, the notice shall state briefly the nature of the petition. At the hearing and upon satisfactory proof the court may order the sale, mortgage, exchange, pledge or lease

of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-620. Collateral attacks precluded.

No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

No. 89-1444

In The

Supreme Court of the United States

October Term, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A.,
as Personal Representative of the
Estate of Velma Rife Jones
(deceased), et al.,

Respondents.

On Petition For A Writ Of Certiorari To
The Supreme Court Of Wyoming

BRIEF IN OPPOSITION OF RESPONDENTS FIRST SECURITY BANK OF UTAH, N.A. AND FIRST SECURITY BANK OF ROCK SPRINGS

RONNY L. CUTSHALL
Counsel of Record
RANDALL N. SKANCHY
ANDREW H. STONE
JONES, WALDO, HOLBROOK &
McDONOUGH
170 South Main Street
Suite 1500
Salt Lake City, Utah 84101
(801) 521-3200

Attorneys for Respondents First Security Bank of Utah, N.A. and First Security Bank of Rock Springs

CORKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THE INTERPRETATION OF THE WYOMING SUPREME COURT OF A WYOMING STATUTE DETERMINING WHETHER PETITIONER IS A NAMED BENEFICIARY IN A WILL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

2. WHETHER THE DUE PROCESS CLAUSE REQUIRES NOTICE OF A PROBATE SALE OF ESTATE PROPERTY OTHERWISE DEVISED TO A TRUSTEE OF A TESTAMENTARY TRUST TO ALSO BE GIVEN TO A REMAINDER BENEFICIARY OF THAT TRUST IF NOTICE OF THE SALE IS GIVEN TO THE TRUSTEE AND IF THE TRUST'S TERMS PERMIT THE TRUSTEE TO SELL THE PROPERTY WITHOUT NOTICE TO THE TRUST BENEFICIARY.

RULE 29.1 STATEMENT

Respondent First Security Bank of Utah, N.A. is a national banking association. Its parent corporation is First Security Corporation and it has no subsidiary corporations.

Respondent First Security Bank of Rock Springs is a Wyoming corporation. Its parent corporation is also First Security Corporation and it has no subsidiary corporations.

RULE 29.4 STATEMENT

Since the proceeding draws into question the constitutionality of Wyo. Stat. § 2-7-205(b), an act of Wyoming affecting the public interest, and neither the attorney general of Wyoming nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

MISCELLANEOUS

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the Constitution of the United States, Amendment 14, Section 1, and Wyoming Statutes 2-7-202, 2-7-205, 2-7-402, 2-7-614, 2-7-615 and 2-7-620 are set out in Appendix D.

No. 89-1444

In The

Supreme Court of the United States

October Term, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., as Personal Representative of the Estate of Velma Rife Jones (deceased), et al.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS FIRST SECURITY BANK OF UTAH, N.A. AND FIRST SECURITY BANK OF ROCK SPRINGS

Respondents First Security Bank of Utah, N.A. and First Security Bank of Rock Springs respectfully request that the Petition for a Writ of Certiorari sought by Petitioner to review the judgment of the Supreme Court of Wyoming entered on November 15, 1989, be denied.

OPINIONS BELOW

Petitioner appealed the decision of the District Court in and for Sweetwater County, Wyoming to the Supreme

Court of Wyoming. The Supreme Court of Wyoming, in a 3-2 decision, denied Petitioner's original appeal, which is reported at 770 P.2d 1100 (App. A, *infra*). Upon rehearing the Supreme Court of Wyoming, this time in a 4-1 decision, again denied Petitioner's appeal. That decision on rehearing is reported at 782 P.2d 229 (App. B, *infra*). The opinion of the District Court is not officially reported. (App. C, *infra*).

STATEMENT OF THE CASE

Joseph George Jones, Jr., ("Mr. Jones") and Velma Rife Jones, ("Mrs. Jones") owned certain real property located in Sweetwater County, Wyoming, commonly known as the Rife Ranch. (App. A3; R. 197.)[1] The Rife Ranch included 17 non-contiguous parcels of deeded land and various federal and state leases of government-owned property spread over a thirty by twenty mile area in southwest Wyoming.[2] (R. 233.) Mr. Jones, a Utah resident,

[1] "R.___" denotes reference to the original record of the District Court proceedings filed in the Supreme Court of Wyoming.

[2] The fee land of the Rife Ranch is contiguous only by virtue of adjacent federal or state lands which were leased by the Rife Ranch and are completely isolated within the federal and state lands. Additionally, about 23,360 acres of the fee property is located on what is commonly referred to as the "checkerboard" area in which every other section of property was deeded to the railroad for twenty miles on either side of the railroad line. This checkerboard effect made it difficult both to manage and later to market the Rife Ranch. (R. 291, 399-400.)

preceded Mrs. Jones in death. As part of the administration of Mr. Jones' estate, First Security Bank of Utah, N.A. ("First Security-Utah") and First Security Bank of Rock Springs ("First Security-RS") (collectively "Banks"), as co-personal representatives, requested an appraisal of the Rife Ranch to determine its "estimated" value, which appraised at $1.2 million in 1985.[3] (R. 292.)

Approximately one and one-half years after Mr. Jones' death, Mrs. Jones, also a Utah resident, died testate on October 19, 1986. (R. 198.) Mrs. Jones' Will ("Will") contained cash bequests to six surviving cousins and left the remainder to First Security-Utah as Trustee of a charitable remainder unitrust ("Trust"). (App. A3; R. 12-26.) The Trust provides the Trustee with the ordinary powers of a trustee to sell, exchange, and otherwise manage the assets of the Estate. (R. 17-19.) The Trust further provides that at the death of the lifetime beneficiary of the Trust,

---

[3] The appraisal clearly indicates in its prefatory pages that it is merely an "estimate" of the "highest price" the property might bring at sale. (R. 250.) The appraiser also noted that a substantial decline in the value of real estate in the area was ongoing, with potential sellers and realtors alike expressing "considerable pessimism with regard to the current real estate market," (R. 290) and that this substantial decline was due in part to "very high mortgage interest, low commodity prices, escalating expenses and a lack of direction concerning federal agricultural programs." (R. 290.) Furthermore, Petitioner insinuates throughout its Brief the impropriety of the sale without a reservation of mineral rights, even though its Brief is devoid of any citation to the record of the value, or even existence of the mineral rights beyond the few sections listed in the appraisal report. (R. 265.) The appraisal does note, however, that First Security-Utah had information on mineral rights and that "[m]inerals in the general area have traditionally been sold all or in part with the surface rights, with no discernible value contribution . . . " (R. 265-266.)

Mrs. Darrell Rife Mork, the remainder of the Trust would be distributed equally to Petitioner and the University of Utah, provided that at such time each qualified as a charitable organization pursuant to §§ 170(c) and 2055(a) of the Internal Revenue Code. (R. 16.)

After Mrs. Jones' death, First Security-Utah and First Security-RS were appointed as the co-personal representatives of Mrs. Jones' Estate ("Estate") (R. 2) and on February 20, 1987 a Petition for Probate of Will was filed by the co-personal representatives of Mrs. Jones' ancillary probate in Wyoming. (R. 4.) The Petition for Probate of Will acknowledged that the Estate had an ownership interest in the Rife Ranch and "estimated" its value at $1.2 million, which figure was based upon the old 1985 appraisal prepared at the death of Mr. Jones. (R. 4.)

In the administration of the Estate, First Security-Utah requested a new appraisal from the same appraiser who had prepared the original 1985 appraisal. On February 24, 1987, the Rife Ranch was reappraised at an estimated value of $925,000. This lower figure represented the rapid decline in the real estate market in southwestern Wyoming over the year and a half since the original appraisal.[4] (R. 378-486.)

---

[4] The $300,000 decrease in the estimated value of the Rife Ranch over 1½ years was attributed to a substantial decline of 12-14% per year for recent sales of ranches in the area. The appraiser warned that the second appraisal, which contained estimated values ranging from a low of $820,000 to a high of $1.2 million, was more accurate at the low end since the real estate market was continuing to rapidly decline. Furthermore,

(Continued on following page)

Several months after the Will was admitted to ancillary probate in Wyoming, Respondent Southern Wyoming Cattle Company, a joint venture of respondents Rock Springs Grazing Association, Lazy VD Land and Livestock, and Elza Eversole, (collectively "Buyers") made a cash offer to the co-personal representative First Security-Utah of $820,000. (R. 488.) Upon receipt of the cash offer, First Security-Utah contacted the appraiser and discussed the offer in connection with the appraisal reports. (R. 492-502.) The appraiser concluded that the cash offer was reasonable because of its cash nature and because the opportunity cost of the money invested, coupled with the continuing decline in land values, outweighed the insignificant 12% differential between the $820,000 cash offer and his $925,000 appraisal.[5] (R. 492-3.)

(Continued from previous page)

the appraiser warned that the sales data relied upon in the appraisal was already eight months old and that in such a declining market the figures were already dated. (R. 399-401.)

[5] Petitioner suggests that the Rife Ranch sold for 30% less than its appraised value of $1.2 million, choosing to completely ignore that: 1) the 1985 appraisal was outdated and was not relied upon by the Estate; 2) a second appraisal was prepared for the Estate; and 3) the appraiser reviewed the cash offer of Buyers and approved its reasonableness. While Petitioner attempts by this artifice to imply egregious conduct, the facts suggest otherwise. The sale of the Rife Ranch was a mere 12% less than the estimated appraised value, which admittedly relied heavily on old data. Furthermore, the figure of $820,000 was one of the valuation figures which the appraiser arrived at in his appraisal, but chose not to use. (R. 400.) Thus, despite Petitioner's underlying suggestion of wrongdoing throughout its Brief, nothing in the record supports such innuendo.

Accordingly, the co-personal representatives filed a Petition for Authority to Sell Real Property and for Confirmation of Sale with the Court, as required by Wyo. Stat. §§ 2-7-614 and 2-7-615. (R. 54.) Pursuant to Wyo. Stat. § 2-7-205, the co-personal representatives contacted each of the named beneficiaries of the Will, the Trustee First Security-Utah and the specific devisees, and obtained waivers of the notice to hearing on the proposed sale.[6] (R. 58.) The reasons for the sale set forth in the Petition for Authority to Sell the Property were that it was in the best interest of the Estate to sell the Rife Ranch because it was not currently in operation; the Estate was in need of liquid assets to pay debt, costs of administration and taxes;[7] and the Trust, through the Trustee, had no desire to own or operate the Rife Ranch.[8]

---

[6] Petitioner implies that the Banks had ulterior reasons for not giving formal notice of the proposed sale to Petitioner or the other Trust beneficiaries. Rather, Wyoming Stat. § 2-7-205 requires only that notice be given to the beneficiaries named in the Will, and as a Trust remainderman beneficiary Petitioner was not entitled to, and therefore not given, notice.

[7] Petitioner mistakenly makes the assumption in footnote 7 of its Brief that sufficient liquid assets remained ($108,940) after payment of expenses to provide for the needs of the Estate. However, this simple arithmetic fails to take into account the future income needs of the lifetime beneficiary, Mrs. Mork who was in an enfeebled condition and required intensive medical care. Petitioner also fails to take into account the operational expenses associated with merely maintaining the Rife Ranch. The investment income to be derived from $100,000 would not have met either need, let alone both of them.

[8] Petitioner implies that this language means that the Banks were representing that "Petitioner had no desire to own

(Continued on following page)

The sale of the Rife Ranch was approved by the District Court on May 19, 1987. (R. 98.) Two months after the sale, Petitioner moved the District Court to set aside the sale pursuant to Wyoming Rules of Civil Procedure, Rule 60(b), the Wyoming equivalent of the federal rule, claiming that it was a beneficiary named in the Will and that, regardless of the needs or best interests of the Estate, its wishes as a prospective Trust remainderman that the property not be sold should supersede all other concerns of the Estate. Petitioner took this position despite the fact that it had no legal interest in the property, no right to notice of sale of the property under Wyoming law and no right to notice of a sale by a Trustee under the terms of the Trust. In fact, the terms of the Trust provide the Trustee with the power, at its sole discretion, to sell the property. (R. 19.) The District Court denied Petitioner's Motion for Relief. (App. C; R. 596-601.)

The Wyoming Supreme Court affirmed the District Court's denial of the Rule 60(b) motion in a 3-2 decision (App. A), holding that a contingent beneficiary of a testamentary trust is not entitled to notice of the proposed sale of an estate asset, thereby making it unnecessary to address other issues raised by Petitioner. (App. A9.) Upon the retirement of Justice Brown, the author of the majority opinion, Petitioner sought a rehearing of the matter. In a

---

(Continued from previous page)

or operate the property." This is inaccurate. The plain language of the Petition indicates that *the ultimate beneficiary* of the Estate was the *Trust*, which had no desire to own or operate the Rife Ranch. Here, as throughout the Petitioner's Brief, Petitioner misleadingly suggests that it was a beneficiary of the Will, when in fact it was a remainder beneficiary of the Trust.

4-1 decision, written by Chief Justice Cardine, who had earlier dissented, the Wyoming Supreme Court affirmed its earlier decision, except that it withdrew any categorization of Petitioner as a contingent beneficiary. (App. B.) It found such categorization unnecessary to its holding that Wyoming law does not require notice to beneficiaries not named in the Will. (*Id.* at 3.) Thus, the Wyoming Supreme Court reasoned that "any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of the notice requirements" of Wyoming law. (*Id.*)

REASONS FOR DENYING THE WRIT

Petitioner seeks certiorari to the Wyoming Supreme Court in order to obtain additional review of the Wyoming State District Court's refusal to set aside its order approving the sale of the Rife Ranch. This matter has already been considered and rejected by three courts, once by the state district court and twice by the Wyoming Supreme Court.

This case does not involve any important federal issue. The interpretation of a Wyoming probate statute does not present a federal question; nor is that statute or the Wyoming Supreme Court's interpretation of it inconsistent with this Court's precedent. Petitioner had no interest in the administration of the Estate under Wyoming law. Neither does petitioner have any right to control the sale of the Trust's assets. While Petitioner's argument presupposes that it has a property interest in the Jones' Estate, the Wyoming Supreme Court did not

make such a supposition. As Justice Brown cogently observed in the Wyoming Supreme Court's original opinion, Petitioner cannot "bootstrap" its status as a contingent beneficiary of a trust created under a will to transform itself into a beneficiary under the Will. (App. A9.) Likewise, Petitioner cannot "bootstrap" a conjectural and future interest in the Trust to a constitutionally protectable interest in the Estate. Finally, even to the extent it were determined that Petitioner holds some constitutionally cognizable interest, the Wyoming probate procedure accorded those interests appropriate notice.

I.

THIS CASE DOES NOT PRESENT A SPECIAL AND IMPORTANT QUESTION OF FEDERAL LAW.

A. The Interpretation of a State Statute is a Matter Exclusively Within the Province of the State Court.

This Court does not review the judgments of state courts except when the validity of a state statute is drawn into question under federal law. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); 28 U.S.C. § 1257(a). This Court does not sit as a "super-legislative body," concerning itself with the wisdom of state law. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969). The decision of the Wyoming Supreme Court dealt with its interpretation of its own state law and this Court should not review a matter of purely state law.

Petitioner asserted at the District Court proceeding that it was a "beneficiary named in the will" and therefore was entitled to notice pursuant to Wyo. Stat. § 2-7-205. (App. A5.) Petitioner argued that failure to

provide it notice violated the requirements of the Wyoming probate statute and, therefore, the probate court's approval of the sale of Estate property should have been set aside. (Id.) The applicable Wyoming statute provides:

> Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-215, 2-7-806, 2-7-807, and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate *or to all of the beneficiaries named in the will of a decedent dying testate.*

Wyo. Stat. § 2-7-205(b) (emphasis added). The question then presented to the Wyoming District Court and subsequently to the Wyoming Supreme Court was whether Petitioner was "a beneficiary named in the will."

This Court has consistently held that the interpretation or construction of a state statute is exclusively within the province of state courts and is not reviewable by the Supreme Court. *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971), ("[a]s the case reaches us we must, of course, accept the construction that the Supreme Court of Wisconsin has put upon the state statute.")

Here, the only question decided by the Wyoming Supreme Court was the interpretation of whether Petitioner was "a beneficiary named in the will" as provided by Wyo. Stat. § 2-7-205(b). After reviewing the statute, the Wyoming Supreme Court determined that Petitioner was not "a beneficiary named in the will" and therefore was not entitled to notice of the sale of estate property. (App. A8.) On rehearing, the Wyoming Supreme Court

reaffirmed its decision, limiting the scope of its decision to the interpretation of the statute. (App. B3.) Justice Cardine, who dissented in the original opinion, established the narrowness of the Wyoming Supreme Court's decision, when in writing for the majority he noted that:

> [t]he crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a beneficiary under the will.

(App. B3.)[9]

The Wyoming Supreme Court's interpretation of its statute to determine whether Petitioner was a beneficiary named in the Will is the conclusive construction of Wyoming's statute. As such, the question of whether Petitioner is or is not a beneficiary named in the will is not a federal question for this Court.

B. The Interpretation of Wyoming's Probate Code is Exclusively Within the Province of the State Court.

This Court has held in a long line of cases that the orderly disposition of property at death is primarily a

---

[9] It is significant to note that Justice Cardine in his original dissenting opinion felt that notice could be required by the due process clause, but that it was unnecessary to so decide because he interpreted the statute to mean that Petitioner was "a beneficiary named in the will." (App. A10.) Obviously, on rehearing he did not feel due process required notice to the parties other than the beneficiaries named in the will and Petitioner, as a beneficiary not named in the will did not have right to notice as a matter of statutory interpretation.

state law decision. *See, e.g. Farrell v. O'Brien*, 199 U.S. 89 (1905). In *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) this Court reaffirmed that principle, noting that:

> [t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual states . . . Absent infringement of a constitutional right, the federal courts have no role here, and even when constitutional violations are alleged, these courts should accord substantial deference to a State's statutory scheme of inheritance.

Certainly, the question of whether a party is a "beneficiary named in the will" is particularly a matter within the competence of the state court and its statutory scheme of probate. Review in this case would undermine the traditional deference given the states in such probate matters.

Because this Court does not substitute its own judgment for a state Supreme Court's construction of state laws, and particularly those relating to probate matters, and because those were the only issues decided by the Wyoming Supreme Court, this case offers only a narrow federal issue for the Court's review. The only potential role for this Court in this case would be to consider arguments that Wyoming's probate statute, as finally construed by the Wyoming Supreme Court, "is repugnant to the Constitution." 28 U.S.C. § 1257(a).[10]

---

[10] Petitioner's jurisdictional statement evades a direct challenge to the constitutionality of the Wyoming probate statute, seeking instead to base this Court's jurisdiction on the assertion that the Wyoming Supreme Court's decisions are repugnant to the Constitution. Section 1257(a) does not permit

(Continued on following page)

C. The Issue of the Constitutionality of the Wyoming Statutory Probate Procedure Has Not Been Raised.

Petitioner has yet to assert that Wyoming's probate statute is unconstitutional. The Court's certiorari jurisdiction over decisions from state courts derives from 28 U.S.C. § 1257(a) which provides that:

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution.

In exercising such jurisdiction this Court has held that it has no jurisdiction over such issues unless a federal question has been properly presented or determined in the court below. *Illinois v. Gates*, 462 U.S. 213, 218 n. 1 (1983).

The Wyoming Supreme Court's original opinion and its opinion on rehearing are both silent on the issue of the constitutional claim of Petitioner. In the Wyoming Supreme Court's original opinion, the Court listed the issues presented by Petitioner with no mention of a constitutional issue. (App. A2.) Clearly the Wyoming Supreme Court did not address or decide the issue now being urged upon this Court. This Court has stated that "when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the

---

(Continued from previous page)

such a theory. Petitioner does not suggest a conflict with any federal statutory law nor specially claim any title, right or privilege under the Constitution. Therefore, Petitioner must challenge the statute's validity or this Court lacks jurisdiction.

state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Rule 5.07 of the Wyoming Rules of Appellate Procedure provides that "[i]n all cases both criminal and civil . . . in which a statute is alleged to be unconstitutional . . . counsel shall also serve a copy of their brief upon the attorney general." The reason for such a rule is obvious: "[t]he attorney general, being the chief legal officer of the State, has a duty to protect the interests and the welfare of the people in declaratory judgment actions where statutory constitutional questions are in issue." *Ririe v. Board of Trustees of School District No. One*, 674 P.2d 214, 219 (Wyo. 1983), citing *Tobin v. Pursel*, 539 P.2d 361, 365 (1975).[11] Compliance with this rule is mandatory and failure to comply can render an appeal vulnerable to dismissal for lack of jurisdiction. *Ririe*, 674 P.2d at 220.[12] The constitutionality of the statute was not properly presented to the Wyoming Supreme Court as a result of this

---

[11] While *Tobin* was concerned with an appeal from a declaratory judgment action, the *Ririe* decision makes it clear that the purpose of the Wyoming Rules of Appellate Procedure are the same and the "need for the state's chief legal officer to protect the public interest does not depend upon the classification of the proceedings in which the constitutional challenge arises." *Ririe*, 674 P.2d at 219.

[12] The appeal was not dismissed in *Ririe* because the appellant belatedly complied with the rule and therefore the court was "not asked to render a decision on the constitutionality of a state statute without the benefit of the viewpoint of the representative of the people of this state." *Ririe*, 674 P.2d at 220.

failure. Such failure must be assumed to be a basis for the Wyoming Supreme Court's silence on the constitutional issue.

Petitioner has also failed to provide appropriate notice of this proceeding pursuant to United States Supreme Court Rules, Rule 29.4. Rule 29.4 requires that "[i]n any proceeding in this Court wherein the constitutionality of any statute of a State is drawn into question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper filed in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable and shall be served upon the attorney general of that State." 28 U.S.C. § 2403(b) provides that "[i]n any action, suit, or proceeding in a court of the United States to which a state or any agency, officer or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . "

Petitioner has not raised the constitutionality of Wyoming's probate statute and that issue, accordingly, is not before this Court.

D. The Sufficiency of Wyoming's Probate Procedure Is Not a Special and Important Federal Question.

Even were a challenge to the constitutionality of the state statute properly presented, there is no generally applicable principle of constitutional law to be derived from the Court's acceptance of this case. As this Court's

own rules provide, a review by writ of certiorari "is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons." United States Supreme Court Rules, Rule 10. This case does not present this Court with either a special or an important issue. Petitioner's claim in this case depends solely upon the terms of an individual Trust, the terms of a particular Will, the application of one state's probate laws and the unusual circumstance that the Trustee of a testamentary Trust also serves as personal representative of the Estate. While such unique facts may present an interesting intellectual exercise, they do not supply the special and important reasons required for a grant of certiorari; special and important reasons "imply a reach to a problem beyond the academic or episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Constitutional review of Petitioner's claim would necessarily be limited to the peculiar circumstances of this one case. This case does not provide the Court an appropriate platform from which to establish new constitutional principles.

II.

THE WYOMING STATUTORY PROBATE PROCEDURE IS CONSISTENT WITH DUE PROCESS DECISIONS OF THIS COURT.

This Court's decisions have established a two part test to ascertain when a state's notice procedures violate due process. First, there must be a state deprivation of a constitutionally protected interest. Second, the challenged method of notice, to withstand constitutional scrutiny, must be reasonably calculated under the circumstances to

apprise parties holding such interests of the pendency of the action. This Court has held in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) that "if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." In this case both of these elements are absent from Petitioner's claim. The Petitioner did not have a constitutionally protected property interest in the Estate and the notice provisions of Wyo. Stat. § 2-7-205(b) are reasonably calculated to apprise interested parties of the sale of estate assets.

A. Petitioner Had No Property Interest.

1. As a Remainder Beneficiary of a Testamentary Trust Petitioner had no Constitutionally Protected Interest in the Disposition of Assets of the Estate.

This Court has long recognized "that [p]roperty interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, whether Petitioner had a "property interest" protected under the Constitution is a matter of Wyoming law. Wyoming law, both statutory and judicial, clearly does not grant a remainder beneficiary of a trust a property interest in the assets of a decedent's estate. Wyoming statutory law provides that title to a decedent's property "passes to the person to whom it is devised by his last will . . . " Wyo. Stat. § 2-7-402. This has long been the law of Wyoming. *Cook v. Elmore*, 25 Wyo. 393, 404, 171 P. 261, 264 (1918). The

Wyoming Supreme Court's decision in *In re Potter's Estate*, 396 P.2d 438, 447 (Wyo. 1964), put this issue to rest when it held that "[o]nly the executor, administrator, spouse, next of kin, heirs, legatees, devisees and creditors of the deceased or of the administration are parties interested in the estate." Furthermore, the Wyoming Supreme Court has long held that contingent or future "expectancies or possibilities of inheritance which may be fulfilled or defeated, depending upon various contingencies and situations" are not sufficient protectable property rights. *Jensen v. Jensen*, 4 Wyo. 224, 89 P.2d 1085, 1088 (1939); *cf Foster's Inc. v. City of Laramie*, 718 P.2d 868, 876 (Wyo. 1986) ("To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it" citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)).

In this case, upon the death of Mrs. Jones, the property of the Estate passed to First Security-Utah as Trustee, subject to possession of the personal representatives. The Petitioner had no property interest in the Estate to protect. Petitioner only had an interest in the Trust, which provided that Petitioner could receive, in the future, a share of its proceeds depending upon the fulfillment of certain contingencies.

2. Whatever Interest or Expectation Petitioner had in the Trust Assets Was Subject to the Management and Control of the Trustee.

The Trustee had the power, in its sole discretion, "without order or license of any court" to "sell, exchange, lease, pledge, mortgage, transfer, convert or otherwise dispose of . . . any and all property at any time forming a part of the Trust Fund, in such manner . . . as the Trustee

may deem advisable." (R. 17-19.) Thus, even if the personal representatives had not sold the Rife Ranch, the Trustee had sole discretion to do so without notice to the Trust beneficiaries.

The procedural protections accorded a property interest may be limited by the terms of an instrument that creates the interest. *Board of Regents v. Roth*, 408 U.S. 564 (1972). In *Roth*, an assistant professor at a state university claimed that he was denied due process before being deprived of his "property interest" in his continued employment. This Court, noting that his employment contract contained a termination date with no provision for renewal, disagreed:

> [T]he terms of the [professor's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or university rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578 (footnote omitted, emphasis by the court). In this case, neither the Trust's terms nor Wyoming probate procedure creates any "legitimate claim" for Petitioner to control disposition of Trust property. Yet, despite this fact, Petitioner argues that the due process clause *requires* Wyoming to provide for notice of such disposition in its probate procedure. Just as due process did not expand the terms of the assistant professor's

contract in *Roth*, that same clause cannot be read to create some right in the Petitioner to control the sale of the Trust property when that right is not provided by either the Trust's terms or Wyoming probate law.

3. Whatever Interest Petitioner had in the Trust Assets is Future and Conjectural.

While this Court recognizes the protection due process rights extend to property interests, "the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth*, 408 U.S. at 570. In *Mullane*, this Court noted that it is not "unreasonable for the state to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future." *Mullane*, 339 U.S. at 317. "Nor is everyone who may conceivably have a claim properly considered a creditor entitled to notice." *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 490 (1988). "Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims." *Id.* Clearly this Court has recognized that in the name of due process, notice requirements have their limits. Petitioner in this case had no interest in the Rife Ranch and should not be entitled to notice of its sale. It was not a beneficiary under the Will, it had no right to direct the Trustee concerning the Rife Ranch and its interest in the Trust proceeds was future and conjectural.

4. The Sale of the Rife Ranch Does Not Eliminate Petitioner's Recourse Against the Trustee.

The Wyoming Supreme Court's decision is consistent with this Court's decisions involving statutes which

extinguish potential causes of action. Petitioner's reliance on those decisions is misplaced. In *Mullane*, the deprivation of a property right was manifested by the fact that the New York judicial procedure eliminated the rights of the Trust beneficiaries to "have the trustee answer for negligent or illegal impairment of their interests." *Mullane*, 339 U.S. at 313. Similarly, in *Tulsa Professional Collection Services*, the Oklahoma statute required the filing of claims against an estate within two months of publication of a notice advising creditors of the commencement of probate proceedings. The effect of the Oklahoma statute was to "forever bar untimely claims, and by virtue of the statute, the probate proceedings themselves have completely extinguished appellant's claim." *Tulsa Professional Collection Services*, 485 U.S. at 488. In both cases the procedure barred any subsequent action against the Trustee and adjudicated the rights of the beneficiaries without notice.

Petitioner's claims are not extinguished here. The Wyoming District Court's order approving the sale of the Rife Ranch did not alter the obligation of the Trustee to the beneficiaries, it did not settle a final accounting of the Trust, nor did it eliminate any rights the Trust beneficiaries may have against the Trustee for mismanagement of the Trust. The District Court in this case noted as much, stating that if First Security-Utah was remiss in its assent to the sale, Petitioner's remedy would be to sue the bank for damages. (App. C6.) Indeed, the Petitioner has done just that.[13] Petitioner, unlike the trust beneficiaries in

---

[13] Petitioner has brought suit against the Trustee for damages in Wyoming District Court, Third Judicial District, State of

(Continued on following page)

Mullane, or the creditors of the estate in *Tulsa Professional Collection Services*, has not been deprived of rights it may have against the Trustee.

Nor is Petitioner's claim against the Trustee diluted. In *Mullane*, this Court recognized that the judicial settlement of an accounting of a trust whereby the state court ratified the fees and expenses of the trustee was a diminution of the beneficiaries' interests, and in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the Court recognized that a tax sale whereby the mortgagee lost its secured interest in property to a tax-sale purchaser affected the mortgagee's interest. *Id.* at 798. The mortgagee in *Mennonite* had a remedy directly against the property, which the tax sale extinguished. Here, however, the sale does not dilute nor diminish the value of a beneficiary's claim against the Trustee. Petitioner had no right or claim of ownership or interest in the Rife Ranch, only a cause of action against its Trustee. That claim still exists, trust funds still exist and no court order has granted priority over Petitioner's claims against the Trustee, nor extinguished such claims.

Petitioner's reference to Wyoming Statute § 2-7-620 as a bar to suit against the Trustee for mismanagement is also misplaced. Wyo. Stat. § 2-7-620 provides that "no proceedings for sale, . . . by a personal representative of property belonging to the estate is subject to collateral

---

(Continued from previous page)

Wyoming in a case entitled *Shriners Hospital for Crippled Children v. First Security Bank of Utah, et al.*, Civil No. C-89-247, which is still pending.

attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction." This statute makes no reference to a claim against the Trustee and clearly does not bar such an action.

B. Under This Court's Decisions Notice to The Trustee Was Sufficient.

Even if Petitioner had a constitutionally protected interest in the Estate, which it does not, due process was satisfied when the Trustee, as the beneficiary under the Will and the party with the protected property interest, was given notice of the sale. The notice given to the Trustee was appropriate for two reasons. First, a testamentary trustee is the trust beneficiaries' representative with regard to such sales and for purposes of notice thereof; a statute which assumes as much in determining what notice is required is reasonable. Second, no conflict existed in this case between the Trustee and the beneficiaries or among the beneficiaries that would preclude the trustee from acting as the beneficiaries' representative for purposes of notice of the sale.

1. The Wyoming Statute Provides For Reasonable Notice.

The Wyoming probate procedure challenged by Petitioner provides that the personal representative must give mailed notice of the proposed sale to the beneficiaries named in the will. The Wyoming Supreme Court interpreted this provision to require notice to the trustee of a testamentary trust as the named beneficiary in the will, but not to that trust's beneficiaries. (App. A9; B3.)

The due process clause should not be read as invalidating this reasonable statutory procedure.

In this case, the personal representative's notice to the Trustee was constitutionally sufficient notice to the remaindermen. "Generally the trustee has power to represent the beneficiary so that notice to the former is effective against the latter." G. Bogert, *Trusts and Trustees*, § 593 (2d ed. rev. 1980); *see Kerrison v. Stewart*, 93 U.S. 155 (1876). Wyoming's statutory procedure is consistent with this general rule. As the Wyoming Supreme Court recognized, Petitioner's argument that it was entitled to individual notice rather than through its Trustee ignores the "independent life" of the Trust. (App. A8.) To permit Petitioner to "bootstrap" its status as beneficiary under the Trust to that of a beneficiary under the Will would completely ignore the existence of the Trust, the Trustee's role, and the clear intent of Mrs. Jones as the testatrix.

The Wyoming statute makes a reasonable attempt to provide for notice to all interested parties. That is all that is required under *Mullane*. No statute can anticipate every possible conflict that might arise between a trustee and its beneficiaries. If, because of such a conflict, the statutory procedure fails to give notice to an adequate representative of the beneficiaries of a trust, perhaps some action against a trustee arises in favor of those parties. But such an action would be against a private entity, arising out of that entity's purely private conduct. Petitioner's quarrel is with the adequacy of its representative, not the sufficiency of Wyoming's statutory procedure for notice. Any imagined wrong done to Petitioner in this case is not the result of state action, and it is not of constitutional dimension.

2. No Conflicts Disqualified the Trustee.

Petitioner raises for the very first time the suggestion that a conflict of interest between the Trustee and the beneficiaries creates a basis for its assertion of a violation of due process. This issue was never raised at any level of this proceeding in the Wyoming courts. It was not raised at the District Court level, nor was it raised on either of the two proceedings before the Wyoming Supreme Court. As such, this issue was never presented to the Wyoming courts and should not now be appropriate for review by this Court. *Illinois v. Gates*, 462 U.S. at 217-220.

In any event, no conflict between the Trustee and the remainder beneficiary existed with respect to the Trustee's assent to sell the property in this case.[14] The law of trusts recognizes that "the trustee may represent the beneficiary in all actions relating to the trust, if rights of the beneficiary as against the trustee, or the rights of the beneficiaries among themselves, are not brought into question." G. Bogert, *Trusts and Trustees*, § 593 (2d ed. rev.

---

[14] Although the trend is to extend a trustee's power of representation, an exception to the general rule permitting trustees to represent beneficiaries exists in the event of a conflict between a trustee and its beneficiaries or among the interests of the beneficiaries. G. Bogert, *Trusts and Trustees*, § 593 (2d ed. rev. 1980). The issue of the trustee's capacity to represent its beneficiaries in this case is one the Wyoming Supreme Court was and is "competent finally to decide." *Kersh Lake Drainage District v. Johnson*, 309 U.S. 485 (1940). Moreover, if the due process clause were read to mean that this narrow exception requires state statutes to provide for notice to trust beneficiaries whenever a possible conflict exists, the exception would overcome the general rule.

1980). Here, neither the personal representative, the Trustee, nor the beneficiaries of the Trust had any interest in obtaining less than fair market value from the sale of the property. Evidently, Petitioner disagreed with the decision to sell. But that is only a difference in judgment; it is not a conflict of interest that disqualified the Trustee from representing Petitioner despite that difference of opinion. The proceeding permitting the sale of the property did not approve any fees of the trustee as in *Mullane*, nor did it apportion the proceeds between the income beneficiary and the remaindermen.

Petitioner cites several cases in its Brief that it suggests demonstrate that First Security-Utah as Trustee was incapable of representing the beneficiaries in this case. None of these cases, however, support such a proposition. In each of these cases, the Trustee was positioned to withdraw assets from the Trust for its own use, apportion assets among beneficiaries, or foreclose some cause of action against itself. None of these cases involve the trustee's management of trust assets.

In *Mullane*, the Court held that trust beneficiaries were entitled to reasonable, direct notice of a proceeding approving the trustee's fees. The Court reasoned that in such a proceeding, the trustee became an adversary to the beneficiaries. *Mullane*, 339 U.S. at 316. Because of this adversarial relationship, the Court held that the trustee could not represent the beneficiaries' interests in a proceeding to approve his own fees. Thus, the Court held that the New York statute at issue, which provided for only published notice of the proceedings approving the trustee's fees, was invalid. *Id.*

Likewise, in *Hansen v. Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979), the income beneficiary of a spendthrift trust brought an action to dissolve the trust and thereby eliminate the interests of the remainder beneficiaries. On the trustee's motion, the Seventh Circuit held that joinder of the remaindermen was required in a suit to dissolve a trust. As the Court noted, the trustee could not adequately represent the beneficiaries when the suit pitted the interests of the remainderman and the income beneficiary directly against each other. *Id.* at 1153.

Similarly, in *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 252 U.S. App. D.C. 140, 788 F.2d 765 (D.C. Cir. 1986), one income beneficiary sought apportionment of income without joining the other income beneficiaries. Again, that case involved a situation where the beneficiaries' interests conflicted because apportionment among the beneficiaries was sought. In *Azarian v. First National Bank of Boston*, 383 Mass. 492, 423 N.E. 2d 749 (1981), and *In the Matter of the Estate of Wiswall*, 11 Ariz. App. 314, 321, 464 P.2d 634, 641 (1970) the trustees sought approval of their accounts. And in *Estate of Lacy*, 54 Cal.3d 172, 126 Cal. Rptr. 432 (1975) an income beneficiary was not permitted to represent the remaindermen in an action regarding the invasion of the trust corpus.

In all of the cases cited by Petitioner, the issues involved apportionment of trust property between either the trustee or the income beneficiaries and the remaindermen. In such cases, as *Mullane* recognized, the nature of the proceeding is sufficiently adversarial because it divides trust property among the different interests. States may assume, however, that a trustee represents its beneficiaries in actions that do not, by their nature, involve an

adversarial relationship. Such an assumption does not offend *Mullane*. *Mullane*, 339 U.S. at 316. Courts recognize the principle that a trustee who may have a conflict of interest may nevertheless represent its beneficiaries in actions unrelated to that conflict. For example, in *Peterson v. United States*, 41 F.R.D. 31 (D. Minn. 1966), a case quite similar to the facts of this case, the executors of an estate served as trustees of a testamentary trust and one trustee was even an income beneficiary. Nevertheless, the District Court held that the executors could adequately represent the interests of the income beneficiaries and the remaindermen in an action to recover a payment made to the IRS. The court reasoned that all the beneficiaries, as well as the trustees and executors, had an identical interest in recovering the money even though, ultimately, each of the various interests stood to benefit differently from any recovery. 41 F.R.D. at 134. *See also, Kind v. Markham*, 7 F.R.D. 265 (S.D.N.Y. 1945).

When a proceeding at issue involves only the recovery or disposition of property on behalf of a trust, rather than apportionment of that property among the various parties interested in the trust, the trustee can adequately represent all concerned with the trust. Here, the Trustee has no conflict of interest with the income beneficiary or the contingent remaindermen with respect to the sale. The Trustee did not stand to gain any interest in the sale of the Rife Ranch, nor did it stand to eliminate any potential cause of action against it for the exercise of its discretion in its assent to the sale of the property.

CONCLUSION

The Wyoming Supreme Court concluded that, for purposes of probate, the beneficiaries of the Estate are the only persons or entities having an interest in the Estate for which notice of action is required. In that way the intentions of the decedent are carried forward. Even though Petitioner, as a trust remainderman beneficiary, may desire the powers of First Security-Utah, a Trustee, the decedent Mrs. Jones mandated otherwise. For these reasons, and all those set forth above, First Security-Utah and First Security-RS respectfully urge the Court to deny the Petition for a Writ of Certiorari to the Wyoming Supreme Court.

Respectfully submitted,

RONNY L. CUTSHALL
Counsel of Record
RANDALL N. SKANCHY
ANDREW H. STONE
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street
Suite 1500
Salt Lake City, Utah 84101
(801) 521-3200

Attorneys for Respondents First Security Bank of Utah, N.A. and First Security Bank of Rock Springs

APPENDIX A

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),

v.

FIRST SECURITY BANK OF UTAH, N.A.,
Personal Representative; First Security
Bank of Rock Springs, Resident Personal
Representative; Rock Springs Grazing
Association; Lazy VD Land and Livestock;
Elza Eversole; and Lois M. Eversole,
Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.

March 21, 1989.

Contingent beneficiary of testamentary trust established in will sought to set aside sale of estate property. The District Court, Sweetwater County, Kenneth G. Hamm, J., denied motion, and appeal followed. The Supreme Court, Brown, J., Retired, held that contingent beneficiary of testamentary trust was not entitled to individual notice of proposed sale of estate asset.

Affirmed.

Cardine, C.J., dissented and filed an opinion in which Rooney, J., Retired, joined.

Rooney, J., Retired, filed dissenting opinion in which Cardine, C.J., joined.

* * *

Before CARDINE, C.J., THOMAS and MACY, JJ., ROONEY and BROWN, Retired, JJ.

BROWN, Justice, Retired.

Appellant Shriners Hospitals for Crippled Children (Shriners), a contingent beneficiary of a testamentary trust established in the will of Velma Rife Jones, sought relief under W.R.C.P. 60(b) from an order authorizing and confirming the sale of estate assets. The district court denied the motion and Shriners appeals.

Shriners states the issues to be:

1. Whether Appellant has standing to claim relief under W.R.C.P., Rule 60(b).

2. Whether the District Court has the authority under W.R.C.P., Rule 60(b) to set aside the conveyance made pursuant to its Order Approving Sale of Real Property And Confirmation of Sale entered May 19, 1987.

3. Whether failure of Co-Personal Representatives to give Appellant the notice mandated by Wyo. Stat. (1977), §§ 2-7-615 and 2-7-205(b) nullifies the District Court's Order and Personal Representatives' Deed dated May 19, 1987.

4. Whether the purported sale of May 19, 1987 can be set aside because it was unnecessary and not in Appellant's best interest.

5. Whether it was reversible error for this court to cut-off Appellant's discovery and to deny Appellant the opportunity for a full and fair hearing of its claim under W.R.C.P., Rule 60(b).

Answering the following question, similarly posed in Issue No. 3, effectively disposes of all the issues raised by Shriners: Is a contingent beneficiary of a testamentary

trust entitled to separate and individual notice of a proposed sale of an estate asset in addition to notice given to the trustee? We answer that question in the negative and affirm the trial court.

Velma Rife Jones, a Utah resident, died testate on October 19, 1986. Her will contained specific bequests to several named cousins, if they survived her, and the residuary estate was left to appellee, First Security Bank of Utah, N.A., as trustee of a testamentary trust. Darrell Rife Mork, the decedent's sister, was named as lifetime beneficiary of the trust income, with the remainder to Shriners and the University of Utah if they qualified as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code.

The assets of the estate included a Wyoming ranch, and the will was consequently admitted to ancillary probate in Wyoming. Appellees, First Security Bank of Utah and First Security Bank of Rock Springs, were appointed co-personal representatives. Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, and Elza Eversole were interested in buying the ranch, which was appraised at $1.2 million in 1985, and was reappraised at $925,000 in August, 1987. They formed a joint venture called Southern Wyoming Cattle Company and made a cash offer of $820,000 to the co-personal representative, First Security Bank of Utah. The trust officer made minor modifications to the offer and Southern Wyoming Cattle Company accepted those terms.

The co-personal representatives filed a petition for authority to sell the real property as required by W.S.

2-7-614 (July 1980 Repl.). The asserted reasons for the sale were that

> the Estate is in need of liquid assets to pay the debts, specific bequests, costs of administration and taxes of the Estate and that the ultimate beneficiary of the Estate (a trust for the benefit of Darrell Rife Mork, the sister of Velma Rife Jones during her lifetime and then after her death two charities) has no desire to own or operate the Rife Ranch.

The petition further stated that

> [t]here has been filed herein Waiver of Notice of hearing of the above matter by the only beneficiaries of the Estate of Velma Rife Jones, Deceased, and Petitioners believe that no notice of the hearing of the Petition needs to be given.

Attached to the petition were waivers of notice executed by the recipients of the five specific will bequests and First Security Bank of Utah as trustee of the testamentary trust.[1] No notice was given to Shriners or the University of Utah. On May 19, 1987, the court entered an order approving and confirming the sale.

On July 6, 1987, Shriners filed a W.R.C.P. 60(b) motion for relief from the order, requesting the court to set aside the sale and declare it void. Shriners asserted that the failure to provide notice to the contingent beneficiaries or remaindermen violated the statutory notice requirements. The relevant notice statutes provide:

---

[1] The waiver from the bank initially states that First Interstate Bank of Utah is waiving notice. This no doubt is a typographical error.

> Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and *the personal representative shall give notice of the hearing as provided in W.S. 2-7-205,* * * * . At the hearing and upon satisfactory proof the court may order the sale, mortgage, exchange, pledge or lease of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

W.S. 2-7-615 (July 1980 Repl.) (emphasis added).

> Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, *2-7-615*, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the date of hearing, the date for filing objections, or sale, as the case may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to *all of the beneficiaries named in the will of a decedent dying testate.*

W.S. 2-7-205(b) (July 1980 Repl.) (emphasis added).

Shriners asserted that it was one of the "beneficiaries named in the will" and was therefore entitled to notice. In response, the co-personal representatives argued that Shriners, as a trust beneficiary, was not entitled to notice, that Shriners was not entitled to file a motion for relief under W.R.C.P. 60(b), and that the motion for relief was an impermissible collateral attack on the district court's order. In disposing of the motion, the district court did not address the question of whether Shriners was one of the "beneficiaries named in the will" as that term is used in W.S. 2-7-205(b). Instead, the court relied on W.S. 2-7-620 (July 1980 Repl.), which provides:

> No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal

> representative of property belonging to the estate is subject to collateral attack on account of an irregularity in the proceedings which do not deprive the court of jurisdiction.

Relying on *Hartt v. Brimmer*, 74 Wyo. 338, 287 P.2d 638 (1955) and *Security-First National Bank of Los Angeles v. Superior Court of Los Angeles County*, 1 Cal.2d 749, 37 P.2d 69 (1934), the district court concluded that the estate administration was an in rem proceeding and, because the court had jurisdiction over the property and the personal representative, failure of notice to Shriners was not a jurisdictional defect. In addition, the court apparently concluded that Shriners' motion constituted a collateral attack concerning a non-jurisdictional matter. Shriners appeals from the denial of its W.R.C.P. 60(b) motion.

Although our legal analysis of the issues in this case differs from that employed by the trial court, the end result is the same.

Shriners contends that it is a beneficiary under the will and that its interest is vested, rather than contingent, and as a vested beneficiary it was entitled to notice of the proposed sale of an estate asset. In support of this reasoning, Shriners cites *In re Potter's Estate*, 396 P.2d 438 (Wyo. 1964); *McGinnis v. McGinnis*, 391 P.2d 927 (Wyo. 1964); and W.S. 2-7-402, 2-7-615 and 2-7-205. The cases cited by Shriners do not support its contentions.

Potter's Estate involved, among other things, the question of the vesting of real property in the heirs at law of a decedent who died intestate and the necessity of selling estate property. In that case, this court stated that "[o]nly the executor, administrator, spouse, next of kin, heirs, legatees, devisees, and creditors of the deceased or

of the administration are parties interested in the estate." *In re Potter's Estate*, 396 P.2d at 447.

In support of its contention that it is a vested beneficiary or vested remainderman, Shriners cites *McGinnis*. That case has nothing to do with determining the nature of Shriners' interest. In *McGinnis*, a family owned a ranch and in 1941 assigned the oil and gas royalties in trust to a bank. In 1956, one family member received royalty payments and refused to pay the royalties to the trustee. The rest of the family sued the relative, and he defended on the grounds that the assignment was illegal on the basis of the "rule against perpetuities," and that it was an unreasonable restraint on alienation. This court held the trust was valid. Neither *McGinnis* nor *Potter's Estate* involves notice or lack of notice to contingent beneficiaries or contingent remaindermen and has no relevancy in the case before us.

Clearly Shriners' interest in the trust property is not vested. "[A] vested remainder is one which is limited to a person in being, whose right to the estate does not depend on the happening or failure of any future event. *Safe Deposit & Trust Co. v. Bowse*, 181 Md. 351, 29 A.2d 906 [(1943)]. 8 Maryland L.Rev. 142." 28 Am.Jur.2d Estates, § 242, n. 6 (1966). There is at least one future circumstance that would prevent Shriners from ever receiving any benefits under the trust-if, at the time of his death of the life beneficiary of the trust, Shriners is not an "organization described in Section 170(c) and Section 2055(a) of the Internal Revenue Code of 1954 as amended * * * ." The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary

or a contingent beneficiary. It still was not a "beneficiary named in the will."

W.S. 2-7-402 (July 1980 Repl.) states in pertinent part:

> Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However, all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, * * * ."

Under W.S. 2-7-402, title to decedent's property passed to the person to whom it was devised. In this case it passed to First Security-Utah, as trustee, not Shriners or the University of Utah.

W.S. 2-7-615 requires that notice of the hearing for the sale of real property to be given as provided in W.S. 2-7-205 (July 1980 Repl.) "to all of the beneficiaries named in the will of a decedent dying testate." W.S. 2-7-615 and 2-7-205 in combination simply provide that notice of a hearing for the sale of estate property be given to "beneficiaries named in the will of a decedent dying testate." In this case, the beneficiary named in the will is the First Security Bank of Utah, not Shriners or the University of Utah. Shriners and the University of Utah are contingent beneficiaries under the testamentary trust established by decedent. Coincidentally, the terms of the will and the trust are set out in the same instrument, but each has independent life without regard to the other. Stated another way, the will is not dependent on the trust for its

legal existence nor is the trust dependent on the will. Shriners cannot "bootstrap" its status as a contingent beneficiary under the trust to a beneficiary under the will just because the terms of the will and the terms of the trust are set out in the same instrument. Furthermore, just because the testator of the will and the trustor or settlor of the trust is the same person does not make the beneficiary of the trust also the beneficiary "named in the will."

Limiting the requirements of notice to the beneficiaries named in the will, as required by W.S. 2-7-205 and as we have done here, has practical significance. If the contingent beneficiaries of the trust were a large group of persons, an intolerable burden on the administration of the estate would develop and lead to expensive, endless and needless litigation if notice of the sale of an estate asset need be given to each individual contingent beneficiary under the testamentary trust.

Our holding in this case is simply that a contingent beneficiary of a testamentary trust is not entitled to individual notice of the proposed sale of an estate asset. This holding makes it unnecessary to address other issues raised by Shriners.

Affirmed.

CARDINE, C.J., files a dissenting opinion in which ROONEY, Retired J., joined.

ROONEY, Retired J., files a dissenting opinion in which CARDINE, C.J., joined.

CARDINE, Chief Justice, dissenting, with whom ROONEY, Justice, Retired, joins.

I would reverse.

On the issue of notice, Shriners advances two arguments. First, it asserts that it is one of the "beneficiaries named in the will" as that term appears in W.S. 2-7-205(b). Second, it argues that, because of its property interest in the estate, notice is required by the Due Process Clause of the United States Constitution. I would hold that appellant is correct on both counts. Shriners, however, was a "beneficiary" named in the will, and that alone was sufficient to require notice.

It is quite astonishing that the court concludes that contingent beneficiaries are not beneficiaries and therefore not entitled to notice of disposition at private sale of a significant asset. Even more astonishing is the suggestion that a will containing trust provisions is not a will or that trust provisions in a will are not part of the will. The instrument involved here is titled "Last Will and Testament of Velma Rife Jones." Within the body of the instrument is established a trust in which appellant is a named beneficiary. There is no settled law of which I am aware that permits the court to hold that what it does not like in a will simply is not in the will.

To complete this strange circle of result justification is the suggestion that some policy is served by denying notice because contingent beneficiaries may be "a large group of persons" and notice to them would be "expensive," an "intolerable burden" and lead to "endless * * * litigation." And so for expediency, the court approves this sale without the beneficiary, in whom title may ultimately vest, receiving notice or having the right to be heard. The result in this case was sale of a ranch

first appraised for $1,200,000 being sold for the sum of $820,000. Perhaps the amount received for sale of the ranch was reasonable. But one cannot help but wonder, why not give notice of the sale to named beneficiaries.

The Wyoming probate code does not define the term "beneficiaries." When construing statutes, however, "[w]ords and phrases shall be taken in their ordinary and usual sense" and "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." W.S. 8-1-103. In its ordinary and usual sense, the term "beneficiary" means "one who receives something." Webster's Third New International Dictionary (1971). In law, "beneficiary," standing alone, is defined as "[o]ne who benefits from [the] act of another." Black's Law Dictionary (5th ed. 1979). Shriners surely receives something and benefits from the act of the testatrix, Velma Rife Jones. If it meets the qualifications set forth in the will, it is entitled to a remainder interest in the estate. In addition, Shriners is unquestionably "named in the will." Notice, therefore, was required by W.S. 2-7-615 and 2-7-205(b).

ROONEY, Retired Justice, dissenting, with whom CARDINE, C.J., joins.

I join in the dissent of Chief Justice Cardine. In addition to that said by him, I note that this is a *testamentary* trust. Contrary to that said in the majority opinion, it does not have any "independent life without regard to" the will, and it *is* "dependent on the will [for its legal existence]." Appellant benefits only because of the will, albeit through a trust established therein. As expressly set forth in the will, the intent of the testator was to benefit

the appellant-not the trustee. Appellant was a beneficiary named in the will as provided in W.S. 2-7-615.

It would serve no purpose to address in this dissent the other issues presented in this case which become pertinent once appellant is recognized to be a beneficiary under the will. Whether or not I would find reversible error therein is not important.

APPENDIX B

In the Matter of the ESTATE OF
Velma Rife JONES, Deceased.
SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN, Appellant (Petitioner),

v.

FIRST SECURITY BANK OF UTAH, N.A.,
Personal Representative, First Security
Bank of Rock Springs, Resident Personal
Representative; Rock Springs Grazing
Association; Lazy VD Land and Livestock;
Elza Eversole; and Lois M. Eversole,
Appellees (Respondents).

No. 88-4.
Supreme Court of Wyoming.
Nov. 15, 1989.

On Rehearing of Appeal from the District Court of Sweetwater County; Kenneth G. Hamm, Judge.

* * *

Before CARDINE, C.J., THOMAS, MACY and GOLDEN, JJ., and ROONEY, J., Retired.

ORDER DENYING PETITION FOR REHEARING AND CONFIRMING PRIOR DECISION

CARDINE, Chief Justice.

This case came on before the Court upon the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, filed on April 5, 1989; Appellant's Brief in Support of Petition for Reargument and Rehearing, filed April 5, 1989; Appellant's Supplemental Brief upon Rehearing Pursuant to the Court's Order Dated April 21, 1989, filed May 18, 1989; Answer of Appellees, Rock Springs Grazing Association, Lazy VD

Land and Livestock, Elza Eversole and Lois M. Eversole to Petition for Reargument and Rehearing of Appellant, filed May 19, 1989; Brief on Rehearing of Appellees Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole, filed May 19, 1989; Answer and Supporting Brief on Rehearing of Appellees First Security Bank of Utah, N.A. and First Security Bank of Rock Springs, filed May 22, 1989; and Brief of Amicus Curiae University of Wyoming upon Rehearing, filed May 22, 1989; and the oral argument of counsel, and the Court, having reviewed the file and record of the Court and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), finds and holds that:

The primary interest of the University of Wyoming as amicus curiae is expressed in its statement of the issue as follows:

> "1. Whether the property interest of the remainderman of a charitable remainder trust is a contingent interest or vested interest subject to complete defeasance."

The Shriners Hospitals for Crippled Children also expressed concern about its categorization as a contingent beneficiary.

The Court is of the opinion that the prior decision of the Court should be confirmed insofar as it is expressed in the essence of the ratio decidendi:

> "The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a 'beneficiary named in the will.' " *Matter of Estate of Jones*, 770 P.2d at 1103.

The Court now is of the opinion that the description of the Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries of the testamentary trust is not a material concern with respect to the disposition of this case. Consequently, the Court withdraws that categorization and those portions of the prior opinion that seem to depend upon, or discuss, the status of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The Court understands that the requirement in the testamentary trust that those beneficiaries qualify as organizations described in §§ 170(c) and 2055(a) of the Internal Revenue Code is verbiage that is necessary to assure that the trust will be treated as a charitable remainder trust by the Internal Revenue Service. Consequently, it would appear that the point made by the University of Wyoming as amicus curiae that these beneficiaries should be perceived as vested beneficiaries whose interest may be defeated by the loss of their status as a charitable organization is sound and should be respected. We do not deem it necessary to so hold, however, any more than we now deem it to have been necessary to identify Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

The crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need to make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a "beneficiary under the will."

IT, THEREFORE, IS ORDERED that the Petition for Reargument and Rehearing of Appellant, Shriners Hospitals for Crippled Children, be, and the same hereby is, denied, and the opinion of the Court in *Matter of Estate of Jones*, 770 P.2d 1100 (Wyo. 1989), is confirmed except that is modified to withdraw therefrom any categorization of Shriners Hospitals for Crippled Children and the University of Utah as contingent beneficiaries.

ROONEY, Justice, Retired.

I would have granted the petition for the reasons set forth in my dissent and in the dissent of Chief Justice Cardine.

APPENDIX C

(Letterhead of)

THE STATE OF WYOMING
THIRD JUDICIAL DISTRICT

August 27, 1987

Mr. Calvin E. Ragsdale
Attorney at Law
20 East Flaming Gorge Way
Green River, Wyoming
82935

Mr. Henry A. Burgess
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Mr. Michael J. Finn
Attorney at Law
P.O. Box 1152
Rock Springs, Wyoming
82902

Mr. Robert James Wyatt
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

Section 2-7-620, W.S. 1977 provides:

> "No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction."

Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, et al., 37 P.2d 69 (Cal. 1934) seems particularly pertinent here, and I quote at some length from it:

> "The application to vacate the orders approving the first nine accounts of the trustee was made by W.R. Thomas, one of the nephews of the testatrix and a remainderman under the trust provisions and the decree of distribution. The

motion was addressed to the respondent court sitting in probate in the matter of said estate. The grounds of the motion were that the respective orders were void because the trustee failed to include in its petition for settlement the names and addresses of, and to give notice to, the beneficiaries as required by sections 1120 and 1200 of the Probate Code and section 1629 of the Code of Civil Procedure; and on the further ground that the petition in each instance falsely stated that Sallie B. Wolcott was the sole beneficiary of the trust, when, in fact, the trustee knew that W.R. Thomas was such beneficiary and that he resided at Houston, Texas."

* * *

"For the purposes of this proceeding, the petitioner does not dispute the fact that the remaindermen, as well as the cestul que trust, Sallie B. Wolcott, were beneficiaries under the trust, and that addresses of the beneficiaries and particularly of W.R. Thomas were alleged in the petition for the probate of the will. The respondents contend that these facts prove conclusively the lack of jurisdiction of the probate court to make the several orders settling the nine accounts of the trustee and the consequent invalidity thereof, for the reason, so it is claimed, that the court acquired no jurisdiction of W.R. Thomas in said nine proceedings."

* * *

"The question is not concluded by the undisputed facts. A proceeding pursuant to section 1699 of the Code of Civil Procedure, or section 1120 of the Probate Code, like other successive proceedings in the probate and execution of a will or the administration of an estate, is a proceeding in rem." (Citations omitted).

* * *

"The same presumptions as to the validity of its final orders and decrees apply as to judgments and orders of any court of general jurisdiction." (Citations omitted).

* * *

"Therefore a subsequent application in the administration of the same estate to set aside a previous order entered in the course of probate jurisdiction after the same has become final is a collateral attack, and, unless the order is void on its face, it may not on such attack be set aside." (Citations omitted).

The Wyoming case of Hartt v. Brimmer, 287 P.2d 638, 648 (Wyo. 1955) held the failure to give a notice in a probate proceeding was not jurisdictional. The Court said:

"Before proceeding any further we should mention the fact that we have held, though under facts somewhat different, that such notice is not jurisdictional. In re Lane's Estate, 50 Wyo. 119, 58 P.2d 415, 60 P.2d 360, and cases cited. There are, it is true, authorities to the contrary. The question was discussed at length in In re Towndrow's Will, 47 N.M. 173, 138 P.2d 1001, in which notice was given by publication but no personal service was had as required by statute. *The court held that such personal service was not jurisdictional and that the decree admitting the will to probate could not be attacked collaterally. We think we should adhere to the rule heretofore announced by us.* It is more consonant with the common law rule at which a will probated ex parte and without any notice to the heirs was a valid order. In re Towndrow's Will, supra."

And, on page 649:

> *"The proceeding for admitting the will to probate is in rem.* The court, as stated in the petition herein, recited that due notice had been given to the parties. *It then had jurisdiction in the case and its decree cannot be attacked collaterally.* In re Towndrow's Will, supra; In re Lane's Estate, supra. The situation here presents at most a defect or irregularity in the service of the requisite notice."

As counsel notes:

> "The situation in the case at bar is nearly identical to *Hartt*. The only difference is that the activity at issue in the case at bar is a sale of estate property rather than admission of a will to probate. It is axiomatic that the sale of estate property is an in rem proceeding. Thus the factual difference between *Hartt* in the case at bar is of no import."

It is also clear that the Court had subject matter jurisdiction inasmuch as district courts have jurisdiction over probate matters, and also that the Court had jurisdiction over the real property and the personal representative.

Furthermore, as noted in *Hartt*, supra, whether the attack is collateral or direct is immaterial. The Court said, on page 654:

> "The authorities are divided on the question as to whether an action in equity to set aside a judgment or an order is a direct or a collateral attack. 31 Am. Jur. § 614, p. 206. The author of the Annotation in L.R.A. 1918D, 470 seems inclined to the view that it is a direct attack. See Poston v. Delfelder, 39 Wyo. 163, 270 P. 1068, 273 P. 176, on rehearing. We need not decide the point. *We think it makes no difference which view is taken so far as this case is concerned. The probate*

> *proceedings involved were proceedings in rem. The court had jurisdiction to enter the order admitting the will to probate. There was at most a defect or irregularity in the process. As we have seen, courts of equity are, to say the least, ordinarily hesitant to set aside a judgment for mere irregularity in the process,* see also 34 C.J.S., Executors and Administrators, §§ 527, 528, pp. 447, 448, note 92, and will not do so if the attack thereon is not made promptly and so belatedly as in the case at bar. The effect is the same as though the attack were collateral. See Poston v. Delfelder, supra, on rehearing. We do not say what should be the rule if a case of real hardship should be presented. We have no such case before us. We think the result herein should be the same even if we do not consider the probate court to be distinct from the district court."

It is questionable that the giving of notice to Shriners Hospital would have made any difference whatsoever. The original offer to buy was made April 28, 1987, a counter-offer made April 30, 1987 and accepted May 1, 1987. The petition for authority to sell was filed May 19, 1987, the sale was confirmed May 19, 1987, and on the same day various deeds were executed and delivered. It was not until July 6, 1987 that the Motion for Relief was filed by Shriners and only shortly before that that the alleged prospective purchaser disclosed that he was willing to pay a higher price for the property. Therefore, had Shriner been told of the pending sale for $820,000.00, it would not have had before it any other offer to consider. The University of Utah, on July 20, 1987, joined with Shriners' motion, yet the executive director of the University, on July 23, 1987, wrote the vice-president of the First Security Bank saying "It was wonderful news about the

selling of the Wyoming property. I appreciate you keeping me informed."

There is some suggestion in the file that possibly the First Security Bank may have been remiss in failing to seek out other possible buyers. If that is so, perhaps Shriners' best remedy is to sue the bank for damages.

I regret that I have not addressed all of the issues presented in counsels' excellent briefs as it is my general custom, but I am inundated at the moment, and feel that the above approach resolves the problem. However, I also adopt by this reference all other legal arguments and principles submitted by counsel for the purchasers and the First Security Bank, in support of their position to the extent they are applicable. Shriners' counsel is also reminded that all briefs are required to be on 8 1/2 x 11 paper by Rule 403 of the Uniform Rules for the District Courts.

Mr. Ragsdale will please prepare an order denying the Motion, send a copy to Mr. Burgess and Mr. Finn and the original to me for signature.

By the Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

November 4, 1987

Mr. Calvin E. Ragsdale
Attorney at Law
20 East Flaming Gorge Way
Green River, Wyoming
82935

Mr. Michael J. Finn
Attorney at Law
P.O. Box 1152
Rock Springs, Wyoming
82902

Mr. Henry A. Burgess
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Mr. Robert James Wyatt
Attorney at Law
P.O. Box 728
Sheridan, Wyoming 82801

Re: Estate of Velma Rife Jones
P-87-18

Gentlemen:

The opinion I write on the above matter, dated August 27 , 1987, was based upon a point of law. That point of law was that the proceedings concerning the sale of the property could not be collaterally attacked. Therefore, as I saw it then and see it now, further discovery will not change that point of law. Pace v. Hadley is not applicable as far as this case is concerned.

Accordingly, movants Objections to Proposed Order Denying Motion for Relief From Order Under Wyoming Rules of Civil Procedure, Rule 60(b) of Shriner's Hospitals for Crippled Children are denied.

By the Court,

/s/ KENNETH G. HAMM
Kenneth G. Hamm
District Judge

KGH/cjv

APPENDIX D

U.S.C.A. Const. Amend. 14

* * *

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-202. Public auction of real or personal property; contents.

(a) When a sale or real or personal property of a decedent is ordered and is to be made at public auction, notice of the time and place of sale shall be published in a daily or weekly newspaper of general circulation in the county in which the probate is pending and in the county in which such property is situated once a week for three (3) consecutive weeks next before the sale, except in the case of perishable and other personal property likely to depreciate in value or which will incur loss by being kept, and as much other personal property as may be necessary to pay the allowance made to the family of the decedent.

(b) Notice shall set forth the time and place of sale and a description of the property offered for sale, and may provide that any and all bids may be rejected by the personal representative.

(c) A copy of the notice shall also be mailed as provided in W.S. 2-7-205.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-205. Parties entitled to receive.

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper; and

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper.

(b) Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-615, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case

may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(c) Notice of all intended sales of real property not requiring an order of the court shall be mailed or delivered not less than ten (10) days prior to the sale to the surviving spouse, if any, and to the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1; 1989, ch. 114, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 4. Marshalling Assets

§ 2-7-402. Title to decedent's property; subject to administration and payment of debts; priorities.

Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, and his property, except homestead and other exempt property, is chargeable with the payment of debts and charges against his estate. There is no priority between real and personal property, except as provided in this code or by the will of the decedent.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-614. Petition to sell, etc.; generally.

A petition to sell, mortgage, exchange, pledge or lease any real or personal property shall set forth the reasons for the petition and describe the property involved. It may apply for different authority as to separate parts of the property, or it may apply in the alternative for authority to sell, mortgage, exchange, pledge or lease. Whenever it is for the best interests of the estate, real and personal property of the estate may be sold, mortgaged, exchanged, pledged or leased as a unit.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-615. Petition to sell, etc.; notice and hearing; exception; court order.

Upon filing of the petition, the court shall fix the time and place of hearing of the petition, and the personal representative shall give notice of the hearing as provided in W.S. 2-7-205, but as to personal property and as to the lease of real property not specifically devised for a period of not to exceed one (1) year, the court may hear the petition without notice. In those instances where notice is required, the notice shall state briefly the nature of the petition. At the hearing and upon satisfactory proof

the court may order the sale, mortgage, exchange, pledge or lease of the property described or any part thereof at such price and upon such terms and conditions as the court may authorize.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 6. Sale and Other Disposition of Property

§ 2-7-620. Collateral attacks precluded.

No proceedings for sale, mortgage, pledge, lease, exchange or conveyance by a personal representative of property belonging to the estate is subject to collateral attack on account of any irregularity in the proceedings which do not deprive the court of jurisdiction.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1.)

* * *

Wyoming Rules of Appellate Procedure

Rule 5.07. Service of briefs on attorney general.

In all cases both criminal and civil, in which the state is a party, or in which any of its property is involved, or in which a statute, ordinance or franchise is alleged to be unconstitutional, including criminal cases upon reserved questions, and cases arising upon exceptions taken in a criminal case by the prosecuting attorney, counsel shall also serve a copy of their brief upon the attorney general.

No. 89-1444

In The

Supreme Court of the United States

October Term, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VELMA RIFE JONES (DECEASED), ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF OF RESPONDENTS ROCK SPRINGS GRAZING ASSOCIATION, LAZY VD LAND AND LIVESTOCK, ELZA EVERSOLE AND LOIS M. EVERSOLE IN OPPOSITION TO PETITION

CALVIN E. RAGSDALE
Counsel of Record
MARTY & RAGSDALE
20 E. Flaming Gorge Way
Green River, Wyoming 82935
(307) 875-3235

Attorneys for Respondents Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the decision of the Wyoming Supreme Court that a beneficiary of a testamentary trust is not a "beneficiary named in the Will" entitled to notice of the sale of assets of a decedent's estate under §2-7-205, Wyo. Stat. (1977) is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

RULE 29.1 STATEMENT

Respondent Rock Springs Grazing Association is a Wyoming corporation. It has no parent or subsidiary corporations.

RULE 29.4 STATEMENT

Since the proceeding draws into question the constitutionality of Wyo. Stat. § 2-7-205(b), an act of Wyoming affecting the public interest, and neither the attorney general of Wyoming nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISION

STATUTES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

No. 89-1444

In The

Supreme Court of the United States

October Term, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

FIRST SECURITY BANK OF UTAH, N.A., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF VELMA RIFE JONES (DECEASED), ET AL.,

Respondents.

BRIEF OF RESPONDENTS ROCK SPRINGS GRAZING ASSOCIATION, LAZY VD LAND AND LIVESTOCK, ELZA EVERSOLE AND LOIS M. EVERSOLE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

Respondents Rock Springs Grazing Association, Lazy VD Land and Livestock, Elza Eversole and Lois M. Eversole respectfully request that the Petition for a Writ of Certiorari sought by Petitioner to review the judgment of the Supreme Court of Wyoming entered on November 15, 1989, be denied.

OPINIONS BELOW

The opinion of the District Court of the Third Judicial District of the State of Wyoming, in and for the County of Sweetwater, from which Petitioner appealed to the Supreme Court of Wyoming is not officially reported, but is reproduced in Petitioner's Appendix C. The original opinion of the Supreme Court of Wyoming denying Petitioner's original appeal and affirming the decision of the District Court is reported at 770 P.2d 1100 and is reproduced in Petitioner's Appendix A. The Wyoming Supreme Court's opinion on rehearing, again denying Petitioner's appeal, is reported at 782 P.2d 229 and is reproduced in Petitioner's Appendix B.

STATEMENT OF CASE

Velma Rife Jones (hereinafter Mrs. Jones) died on October 19, 1986. (Petitioner's Appendix A2, hereinafter Pet. App. ___, R. 30[1]). Her will was admitted to informal probate in Utah, her domicile at demise, and First Security Bank of Utah, N.A. (hereinafter First Security-Utah), named Executor in the will, was appointed Personal Representative of her estate in Utah. (R. 6-9.) Subsequently, the will was offered for ancillary probate in Wyoming by

[1] "R. ___" denotes references to the original record of the probate proceedings in the District Court of the Third Judicial District of the State of Wyoming, in and for the County of Sweetwater, as filed in the Supreme Court of Wyoming on appeal.

the joint petition of First Security-Utah and First Security Bank of Rock Springs (hereinafter First Security-RS). The will was admitted to probate and First Security-Utah and First Security-RS were appointed Co-Personal Representatives by the District Court in Wyoming (R. 1-31).

Mrs. Jones' will provided for specific pecuniary bequests to several cousins, if they survived her. (R. 13.) All the rest of her property was disposed of under Paragraph Fifth of the will, (R. 13) providing, in part:

> The residue of the property owned by me at my death, real and personal and wherever situate, I give, devise and bequeath to First Security Bank of Utah, N.A. as my Trustee to be held as a separate trust on the following terms:
>
> * * *

Following this language in the will are several pages of instructions concerning the trust and the powers and obligations of the trustee. (R. 13-24.)

The will provided (R. 13-14) that if Mrs. Jones' sister survived her, the trustee should pay income from the trust to the surviving sister during her lifetime. The same paragraph of the will (R. 16) goes on to provide that upon the death of the sister, the trustee, after the complete funding of the trust, shall distribute all of the principal and uncommitted income one-half to petitioner and one-half to the University of Utah, if such entities are at that time qualified as organizations under certain provisions of the Internal Revenue Code. If either or both of the named entities are not so qualified, appropriate contingent instructions are given. The trustee is given full

power to sell assets of the trust in its sole discretion. (R. 17-19.)

A large portion of the assets of the estate of Mrs. Jones was a ranching operation in southwest Wyoming known as the Rife Ranch.[2] That ranching operation consisted of real property in Sweetwater County, Wyoming, leases of state lands from the State of Wyoming, appurtenant federal grazing privileges on the public domain adjacent to and interspersed with the real property, and shares of stock in Rock Springs Grazing Association (hereinafter RSGA).[3]

---

[2] Some statements concerning the ranching operation in Petitioner's Petition are possibly misleading, probably as a result of Petitioner's limited experience concerning the nature and extent of ranching property interests in the area of Wyoming where the Rife Ranch is located. Specific instances of potentially misleading statements will be treated in subsequent footnotes.

[3] Petitioner states in its Petition that Rife Ranch is an approximately 40,000 acre *parcel* (emphasis added) of fee and leased property (Petition, page 3, hereinafter Pet. ___). This might imply that an owner of the ranch has the exclusive use of some 40,000 contiguous acres of land. As pointed out by the appraiser of the Rife Ranch (R. 233, 254, 380), this is not the case. The fee lands of the Rife Ranch consist of approximately 25,000 acres of land. These lands are interspersed with other privately owned lands, federally owned lands and state owned lands. For the most part, they are unfenced and generally undiscernable from neighboring lands in terms of readily ascertainable boundaries. Most of the fee lands lie within an area known as the "checkerboard." *See Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), for a description of the checkerboard about 100 miles east of the lands involved in this action and for a description of some of the problems inherent in such

(Continued on following page)

After Mrs. Jones' death, Ranchers Realty of Lander, Wyoming approached A. W. Dickinson[4], a rancher engaged in livestock raising on lands in the vicinity of the Rife Ranch, to see if he might be interested in purchasing

---

(Continued from previous page)

ownership. *Cf. Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) for a description of checkerboard lands in the immediate vicinity and some of the other problems inherent in such ownership. The reference to leases is also somewhat misleading, inasmuch as the only leases in the traditional sense are those from the State of Wyoming, which are subject to considerable management constraints imposed by the State in the interest of relatively free public access. The federal permits are Section 3 permits and are subject to the management restrictions on such interests. *See* C. Ragsdale, "Section 3 Rights Under the Taylor Grazing Act," IV Land & Water L. Rev. 399 (1969). Finally, the shares in RSGA simply represent the right to graze defined numbers of livestock in common with other shareholders on RSGA ranges, subject to the management restrictions of RSGA and the Bureau of Land Management. All of the lands are used by many other entities under the general concept of multiple use, without much concern for actual record ownership. Thus, the so-called "parcel" is unfenced, is subject to the management dictates of at least three different entities, and the use thereof (including, as a practical matter, the fee lands) is nonexclusive and is shared with other livestock operators, hunters, recreationists, oil companies, wildlife, wild horses and myriad other users. These factors may have played some role in the appraiser's thoughts concerning the difficulties of management of the property and the pertinent considerations concerning value (R. 399-401). It may also explain, to some degree, the trustee's concerns regarding management, income production and the determination to sell. (R. 499-500).

[4] Dickinson is a partner with his wife and children in Lazy VD Land & Livestock.

the ranch or portions of it. (R. 530.) Dickinson indicated interest, if he could find others to participate with him. (R. 530.) Dickinson approached Elza Eversole, another local rancher, and, later, Leonard W. Hay, Vice-President of RSGA,[5] and ascertained that Eversole and RSGA would be interested in joining him in making an offer on the ranch. (R. 526-527, 530-531.) In early April, 1987, Ranchers Realty indicated to Dickinson, Eversole and RSGA that First Security-Utah might entertain an offer and invited them to make one. (R. 527, 532.) Dickinson, Eversole and RSGA created a joint venture styled Southern Wyoming Cattle Co. to make the offer, to take title to the property if the offer were accepted and to distribute the property among them according to their various requirements. (R. 527, 532.) On April 28, 1987, Southern Wyoming Cattle Co. made a written offer to First Security-Utah to purchase the ranch for cash, subject to the conditions stated in the offer. (R. 527, 532, 57, 62, 500, 488.)

---

[5] RSGA owns lands within the checkerboard in Sweetwater County, Wyoming, leases lands within the checkerboard from the State of Wyoming, leases lands within the checkerboard from other private land owners and has grazing permits within the checkerboard from the Bureau of Land Management. A share of RSGA stock presently entitles the shareholder to graze 3500 sheep (or their livestock equivalent) within the Association's range during its stated grazing season of December 15 to May 1. The share is assessable by the corporation for various expenses. RSGA's lands are also unfenced and are interspersed with the lands of other private owners, those of the United States and those of the State of Wyoming. For a somewhat dated, but still relatively accurate, description of RSGA's operation, *see* W. Calef, *Public Lands and Private Grazing*, pp. 202-213 (Univ. of Chicago 1960).

Apparently, the trustee was concerned about the ability of the ranch to generate the income necessary for the benefit of the income beneficiary and about the difficulties of the trustee's administering the property as a reasonable investment.[6] (R. 499-500.) In any event, First Security-Utah, after review of the offer and consultation with the appraiser[7] which it had retained for purposes of

---

[6] As the appraiser had indicated that the $36,000, more or less, per annum being paid on the existing lease was market and that the expected market return was something between three and four per cent per annum, one might perhaps understand these concerns. (R. 394-396).

[7] The appraiser had already brought to the attention of the trustee that there was a declining market for agricultural lands in southwest Wyoming. In the appraiser's view, the value was falling fairly rapidly. Justifiable comparables were hard to obtain and were becoming rapidly dated even when obtained. (R. 399-401) The upshot was that when the appraiser was informed of the cash offer in light of all the foregoing, the appraiser himself, who provided every value figure quoted in Petitioner's petition, thought the price offered was reasonable. (R. 492-493). Further, at various places in its Petition, petitioner insinuates some sort of impropriety in the trustee's having sold the lands with minerals and quotes the appraiser's report. (Pet. 5, n. 4; Pet. 10, n. 8.) An examination of R. 265-266 reveals that of the 25,000 or so acres of deeded lands, fewer than four thousand acres had mineral estate unsevered from the surface estate, that none of the deeded lands with unsevered minerals had any production and that

> "Minerals in the general area have traditionally been sold all or in part with the surface rights, with no discernable value contribution except in those areas where exploration has shown a reasonable certainty of discovery. With the upsurge of oil and gas exploration in the area the past few years, there is

(Continued on following page)

appraising the assets of the estate (R. 500-501), accepted the offer, with minor modifications, on April 30, 1987, and on May 1, 1987, the modifications were accepted by Southern Wyoming Cattle Co. (R. 528, 532-533, 57-58, 63-93, 501, 490.)

The Personal Representatives obtained and filed Waivers of Notice of Hearing on Petition for Authority to Sell Real Property and for Confirmation of Sale from the various specific legatees of Mrs. Jones' will. First Security-Utah, as trustee, issued its own Waiver of Notice as the residuary beneficiary named in the will. (R. 47-53, 58, 94.) First Security-Utah advised Southern Wyoming Cattle Co. that a closing could be held on May 19, 1987. (R. 528, 533.)

On May 19, 1987, the Personal Representatives filed with the District Court their "Petition for Authority to Sell Real Property and for Confirmation of Sale" (R. 54-93), which recited (R. 57-58), *inter alia*, that the Rife Ranch was not being operated and that the petitioners believed that it was in the best interests of the estate and of its beneficiaries that the ranch be sold, for the reasons that the estate was in need of liquid assets to pay the

---

(Continued from previous page)

> currently a trend for owner/sellers to reserve unto themselves the mineral rights. However, there is no concrete evidence in the market that the absence of mineral rights has an effect on the selling price of a property."

In other words, the minerals value was *de minimus*. The purchasers' written offer included minerals. (R. 99).

debts, specific bequests, costs of administration and taxes of the estate[8] and for the further reason that

> the ultimate beneficiary of the estate (a trust for the benefit of Darrell Rife Mork, the sister of Velma Rife Jones during her lifetime and then after her death two charities) has no desire to own or operate the Rife Ranch.

(Pet. App. A3, R. 57.)[9] The petition also indicated that there had been filed in the estate Waiver of Notice of Hearing by the beneficiaries of the estate, and that therefore no additional notice of the hearing needed to be given.

On that same date, the District Court entered its "Order Approving Sale of Real Property and Confirmation of Sale," (R. 94-130) which stated: " . . . waivers of notice of the said filing have been filed herein by those

---

[8] Petitioner suggests in n. 7 of its Petition that $108,940 in liquid assets would be available. Petitioner's arithmetic fails to consider the necessities of the income beneficiary, the costs of administration of the trust or the costs of simply maintaining the Rife Ranch. Further, while the trustee was not required to generate a 9% income return for the income beneficiary, it appears to be the intent of the testatrix that the trustee was to aim for such return. (R. 13-15.) An asset which would produce 3% – 4% return and is the major asset of the trust would appear to adversely affect the available income of the trust and the amount available to the income beneficiary.

[9] Petitioner suggests in its Petition (Pet. 6) that this language somehow suggested to the Court that Petitioner had no desire to own or operate the Rife Ranch. It seems quite clear, in the context of the will, the language of the petition and the fact that the trustee waived notice, that it was the trustee, the beneficiary named in the will, which did not desire to own or operate the Rife Ranch.

persons interested in the said Estate and entitled to notice by statute; . . . " (R. 94) and which ordered and decreed that notice of the matter need not be given, that the Petition for Authority to Sell was approved and allowed and that the sale to Southern Wyoming Cattle Co., pursuant to the terms and conditions of the offer, was confirmed. (R. 97.)

On the same day, a deed conveying the Rife Ranch was executed and delivered by the Personal Representatives to Southern Wyoming Cattle Co. (R. 528, 533.) Southern Wyoming Cattle Co. then delivered its deeds conveying the real property to its various joint venturers (or their nominees) in accordance with their own agreement. (R. 528, 533.) Later that day, all the deeds were recorded. The various grantees went into possession and took the necessary actions to cause the transfer of state leases, federal grazing permits and RSGA shares and caused notification of the change of ownership to be given to various owners of interests in the real property affected by the change. (R. 528-529, 533-534.)

About two months later, Petitioner filed its Motion pursuant to Rule 60(b), Wyoming Rules of Civil Procedure, seeking to have the District Court vacate its Order approving and confirming the sale and to nullify the sale. (R. 131.) The District Court issued its opinion letter denying the Motion (Pet. App. C, R. 596-601) and an Order Denying the Appellant's Motion for Relief under Rule 60(b) was entered by the Court. (R. 915.) Petitioner Appealed from that Order to the Supreme Court of Wyoming. (R. 919.) The Supreme Court of Wyoming affirmed the decision of the District Court in a 3-2 decision issued on March 21, 1989, ruling that Petitioner was not "a

beneficiary named in the will" as contemplated by § 2-7-205, Wyo. Stat. (1977), that First Security-Utah, as trustee, was the "beneficiary named in the will" as contemplated by such statute, and that Petitioner was not entitled to notice of the sale. (Pet. App. A.) Subsequently, on November 15, 1989, the Wyoming Supreme Court modified its earlier opinion, noting that it was not necessary to categorize Petitioner as a "contingent" beneficiary in order to reach its earlier decision. (Pet. App. B.) It ruled that its earlier decision should be

> confirmed insofar as it is expressed in the essence of the ratio decidendi: "The resolution of the problem of notice does not depend, however, upon whether Shriners was a vested beneficiary or a contingent beneficiary. It still was not a 'beneficiary named in the will.' " *Matter of Estate of Jones*, 770 P.2d at 1103.

(Pet. App. B2.) Chief Justice Cardine, author of a dissenting opinion in the first decision, signed the second opinion for the Court.

REASONS FOR DENYING THE PETITION

Briefly stated, this is a case in which the trustee of a testamentary trust, having been granted in the will creating the trust full and exclusive discretionary power to sell any or all of the assets of the trust, consented to a sale by the personal representatives of the decedent's estate of certain of the assets of the estate to a *bona fide* purchaser. Notwithstanding the intentions of the testatrix as expressed in the powers granted the trustee in the will,

notwithstanding the powers of the trustee under the general statutory law of Wyoming, notwithstanding the nature of the interests of a beneficiary of a trust and notwithstanding the equities of a *bona fide* purchaser, Petitioner asserts that it has an absolute right under the Due Process Clause of the Fourteenth Amendment of the United States Constitution which overcomes them all.

Petitioner has confused the issue in this case from its outset. Throughout the proceedings, Petitioner has failed to adequately address important considerations necessary to its due process argument. The elements of that argument are that (1) a state take action, (2) which deprives someone of his property, (3) without due process. *See Parratt v. Taylor*, 451 U.S. 527, 537 (1981). Petitioner's case fails this test.

Petitioner has never shown, and no Court has ever found, that it has a property interest in the specific property which comprised the assets of the estate of Mrs. Jones. Even if there were such an interest, Petitioner does not show the requisite state action necessary to its due process argument.

Further, to require a trustee to notify all beneficiaries of each management decision which the trustee makes with respect to the property of the trust would frustrate the very nature of the comprehensive statutory provisions of Wyoming concerning trusts and trustees and would go far beyond the requirements which this Court has heretofore established. It would adversely affect the reasonable expectations of *bona fide* purchasers and would disregard the special need recognized by this

Court for continuity and predictability where land titles are concerned.

Finally, there really is no substantial federal question presented in this case. The Wyoming Supreme Court simply interpreted its own State statute to determine the parties who have an interest in a probate proceeding and thereby who has the right to notice of activities within that process. If there is a constitutional deficiency in the Wyoming statutory scheme, Petitioner has never properly presented the question to the Wyoming Supreme Court for its determination.

I. WYOMING'S STATUTORY PROBATE PROCEDURE CONFORMS TO THE REQUIREMENTS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Under Wyoming law, Petitioner has no property interest in the specific property constituting the assets of the estate.

The United States Constitution does not create property rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Such cases as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) illustrate that the Constitution will protect rights which are created from improper extinguishment by requiring that due process be observed. However, the interest protected must be created from some source other than the United States Constitution. Such interests are " . . . created and their dimensions defined by existing

rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Roth, id.* Further, for an interest to be created, and thereby protected, the person asserting the interest must show something more than an abstract need or desire for it and more than a unilateral expectation of it. He must show a legitimate claim of entitlement to it. *Id.*

Throughout these proceedings, Petitioner has asserted that it has a vested interest in the very assets of the estate itself. However, a review of the law of Wyoming makes it clear that it had no legitimate claim of entitlement to the specific property present in the estate.

Under Wyoming law, where there is a will, title to a decedent's property "passes to the person to whom it is devised by his last will . . . " § 2-7-402, Wyo. Stat. (1977). (Pet. App. A7) This has long been the law of Wyoming. *Cf. Cook v. Elmore*, 25 Wyo. 393, 404, 171 P. 261, 264 (1918). Further, the only parties interested in the estate in Wyoming are the executor, administrator, spouse, next of kin, heirs, legatees, devisees, and creditors of the deceased or of the administration. *In re Potter's Estate*, 396 P.2d 438, 447 (Wyo. 1964). (Pet. App. A6) In the instant case, a review of Mrs. Jones' will reveals that the general legatee and only devisee under the will is First Security-Utah, as trustee. The property in question passed to the trustee, First Security-Utah, on October 19, 1986, the date of demise of Velma Rife Jones, subject to administration

of the estate as provided by § 2-7-402, *supra*. On that date, in the absence of a prohibition in the instrument creating the trust, the trustee had the discretionary power to sell the property in question, subject only to the administration of the estate. §§ 4-8-102, 4-8-101(a)(iii), 2-7-402, Wyo. Stat. (1977).

Petitioner argues that under the holdings of *Mullane, Mennonite Board of Missions* and *Tulsa Professional Collection Services, Inc.*, it was entitled to notice. In each of those cases, the party entitled to notice had some entitlement, a property interest, which was destroyed by the action taken. In *Mullane*, it was the right to challenge the trustee's accounting. That existing right would be gone forever after the court's action. In *Mennonite*, the mortgagee in question lost its right to redeem. That existing right would be gone forever after the challenged action. In *Tulsa*, the creditor lost its right to file a claim and enforce its right against the decedent in the decedent's estate. That existing right was extinguished forever. In each instance, there was an existing right – an expectation, a property interest – created by the state, which would be lost forever without action. Here, the expectation asserted by Petitioner is the right to take the property in kind (Pet. 12, n.10). Under the law of Wyoming, Petitioner had no legitimate claim of entitlement. Its expectation was unilateral, at best. Petitioner lost nothing and *Mullane, Mennonite* and *Tulsa* simply do not apply.

B. Even if the Petitioner has a property interest under Wyoming law, the testatrix limited the extent and nature of the interest.

As in most states, Wyoming law requires its Courts sitting in probate to give effect to the intentions of a

testator as expressed in the will. § 2-1-102(ii), Wyo. Stat. (1977). *See also, e.g.*, such cases as *Matter of Estate of Deutsch*, 644 P.2d 768 (Wyo. 1982), *Hammer v. Atchinson*, 536 P.2d 151 (Wyo. 1975) and *In re Gilchrist's Estate*, 50 Wyo. 153, 58 P.2d 431, *rehearing denied*, 60 P.2d 364 (1936). Here, the intent is fairly easy to glean. Mrs. Jones intended that any interest which Petitioner might have was to be subject to the absolute right of the trustee to sell the assets of the trust.

Under the powers granted to the trustee under the will, which defined the dimensions of the interest, the trustee had absolute power on the date of Mrs. Jones' death, as the trustee and owner of the property, subject only to administration of the estate, to sell the property in its absolute discretion. (R. 17-19.) The Petitioner had no present vested interest in the property which was the subject of the sale, i.e. the assets of the estate itself. The trust provisions provided that Petitioner only took a share of the principal and income of the trust upon the death of the income beneficiary of the trust, subject to conditions to be determined at such time. Even if Petitioner met the conditions, its only right was to the trust assets then existing after the complete funding of the trust. (R. 16.) The interest which Petitioner has, of whatever nature, is not an interest in the property of the estate, but is an interest in the trust created by the will. To find otherwise would be contrary to the intent of the testatrix, for Mrs. Jones gave the absolute discretionary power to sell the trust assets to the trustee. If the trustee is restricted as to sale discretion and has to consult the beneficiaries of the trust on each decision, the intent of the testatrix is being thwarted. And it is her intent which

creates – which defines – the dimensions of the right created.

Thus, it is not the action of the State of Wyoming which restricts Petitioner's right to notice. It is the very act of the testatrix herself. Her action is not State action. *Cf. Loyd v. Loyd*, 731 F.2d 393, at 398-99 (7th Cir. 1984). Both from the point of view of the interest created and of state action, Petitioner has failed to bring itself within the parameters of the Fourteenth Amendment. As this Court discussed in *Tulsa, supra* at 485-487, there has to be state action. Further, as there indicated, to constitute state action, the state must do more than be merely passive, must do more than merely make available to a private party for private use certain proceedings. *Id.* In this instance, where a private party created the dimensions of the interest, there simply is no State action.

C. To require the notice asserted by Petitioner would adversely affect the comprehensive statutory provisions of Wyoming concerning trusts and trustees and would disregard the special need recognized by this Court for consistency and predictability where land titles are concerned.

The Wyoming legislature has enacted comprehensive statutory provisions concerning fiduciaries such as trustees in the Uniform Trustees Powers Act, §§ 4-8-101, *et seq.*, Wyo. Stat. (1977) (set out in part in Appendix hereto). In that act, Wyoming has provided that trustees in Wyoming shall have certain duties and powers. Among the powers granted by the legislature to trustees is the power to sell the assets of the trust without having to

seek court or beneficiary approval, unless the instrument creating the trust specifically prohibits such discretionary sales.[10] §§ 4-8-102(a), 4-8-103(a), 4-8-103(c)(vii), Wyo. Stat. (1977). By creating such a power in the trustee, the Wyoming legislature necessarily limited the nature of the beneficiary's interest.

Respondents have earlier discussed the requirements concerning the source of protected interests set down by this Court in the *Roth* decision at pp. 13-14, *supra*. Wyoming, as part of its statutory treatment of trusts and trustees, has defined the extent of the interest which a beneficiary has in a trust, just as Wisconsin defined by statutory terms the interest of school teachers such as Roth. Obviously, the interest of a beneficiary in Wyoming is not to any specific asset of the trust, in as much as that specific piece of property can be sold at the discretion of the trustee. This is not surprising in light of the general law of trusts. *See generally Restatement (Second) of Trusts* (1959), §§ 88(1), 187, 190, 202(2), 272, 277. However, what is important is that the laws of Wyoming, which are the source of Petitioner's interest of whatever nature, have limited the extent of Petitioner's interest, in the absence of a contrary instruction from the person creating the trust. This is the State's prerogative, recognized by this Court. *Roth, supra* at 577.

This is not a situation like *Mullane*, where the legislature created a situation in which the existing right of the beneficiary, that of challenging an accounting, was destroyed forever without notice that the right was in jeopardy. It is not a situation like *Mennonite*, where the action

---

[10] § 4-8-105(b), Wyo. Stat. (1977) provides an exception in the event of conflict of interest as there defined. Petitioner has never invoked this provision. *See* text, *infra* at 21-22.

of the state destroyed a right by providing for a procedure which did not give the owner of the right notice to allow it to exercise the only right it had, that of redemption. It is not a situation like *Tulsa*, where the only right of the creditor, that of filing a claim in the decedent's estate – a proceeding at least in part created for his benefit – was destroyed without any reasonable notice. In all of those cases, it was clear that the aggrieved party had a legitimate claim of entitlement to the interest being extinguished. Here, there is no such legitimate claim. The very source of Petitioner's interest defined the limitations of that interest. To require anything further would be to expand the right created and to improperly interfere with the state's right to define property interests.

Further, this Court has indicated that it has traditionally recognized the special need for certainty and predictability where land titles are concerned. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979). It is clear under the general law of trusts that where a trustee has an absolute power of sale and sells to a *bona fide* purchaser, all equitable interests are cut off and extinguished. *See* G. Bogert, *Trusts and Trustees*, § 881; *Restatement (Second) of Trusts*, §§ 283, 284. If the grantee is a *bona fide* purchaser, he takes free of any interest of the beneficiaries, and the beneficiaries are left to their remedy against the trustee for breach of the trust.[11] As part of its

---

[11] Conversely, if the purchaser is not *bona fide*, it follows that a frustrated beneficiary can pursue both the trustee and the purchaser. *See Restatement (Second) of Trusts*, §§ 288, 289, 290, 291. Petitioner suggests "Perhaps the sale of the Rife Ranch was part of a scheme to benefit the purchasers and to

(Continued on following page)

comprehensive statutory enactment, Wyoming has followed this general rule. It has provided that a person dealing with a trustee has the right to presume that the trustee is acting within his powers and that he has the power to act, unless the person has actual knowledge to the contrary. § 4-8-107, Wyo. Stat. (1977). In the instant case, the equities are even stronger. The instrument creating the trust was a public record. The instrument did not withdraw the statutory power of the trustee to sell. In fact, the instrument specifically granted such power to the trustee in its sole discretion. The public record further indicated that the very person with the power to sell had consented to a sale from the estate. If this Court now determines that a trustee with such power, whether granted by statute or by the instrument itself, cannot sell assets of the trust without giving notice to all the beneficiaries of the trust, it seems clear that this Court will not only have created a new right where none now exists, but will make it necessary for every prospective purchaser in every sale by a trustee to demand that every beneficiary

---

(Continued from previous page)

hoodwink the Petitioner." (Pet. 23) If such is the case, then perhaps Petitioner ought to prove its innuendo in a proper Wyoming state court and show that the purchasers are not *bona fide* under § 4-8-107, Wyo. Stat. (1977). Petitioner has made much of its lack of remedy in this case. As was pointed out by the District Court in its opinion, " . . . perhaps Shriners' best remedy is to sue the bank for damages." (Pet. App. C5). If the purchaser respondents are not *bona fide* purchasers, they should be included. And, indeed, Petitioner has filed such an action. *Shriners' Hospital for Crippled Children v. First Security Bank of Utah, N.A., et al.*, Civil Action No. C-89-247, District Court of the Third Judicial District of Wyoming, in and for the County of Sweetwater.

be notified of the sale. This assumes, of course, that such a purchaser can be found after the creation of such a rule. In effect, this Court will be saying that there can never be a *bona fide* purchaser in a trustee's sale. In effect, this Court will be saying that every beneficiary of a trust has an interest in the specific property constituting that trust and that a purchaser buys any portion of such property at his peril. A prospective purchaser will no longer be able to depend upon the terms of the trust instrument, much less the statutory law of his state. *Cf. Board of County Commissioners v. First National Bank*, 368 P.2d 132, 138-140 (Wyo. 1962).

II. PETITIONER DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. Petitioner has raised its conflict of interest argument for the first time in this Court.

Petitioner has raised the question of a conflict of interest by the trustee for the first time in this Court. The conflict question was simply not raised below, either as a basis for assertion of a due process violation or as a basis for any other claim. This Court will not hear questions raised before it for the first time, or stated differently, it will not hear cases presenting entirely new claims. *Illinois v. Gates*, 462 U.S. 213, 217-220 (1983). Here, it is not merely an enlargement of a question presented below, which *Gates* suggests may be an exception. It is an entirely new question. Petitioner suggests that because of the outrageous conflict of the trustee, the Wyoming Supreme Court's decision is so completely contrary to *Mullane* that this Court should summarily reverse the judgment. (Pet. 22, n. 15). This is simply not true. Wyoming statutory law

provides a definition of conflict of interest in such circumstances. § 4-8-105(b), Wyo. Stat. (1977). Wyoming has enacted legislation to establish uniform and definite rules to govern dealings with and breaches by fiduciaries. *Cf. Board of County Commissioners v. First National Bank*, 368 P.2d 132, 136-137 (Wyo. 1962). The conflict question was never presented below, and no state court in Wyoming has ever had an opportunity to rule on such a question. This Court has indicated that it is not inclined to make constitutional decisions where the lower courts have not had the question properly placed before them. *McGoldrick v. Compaignie Generale Transatlantique*, 309 U.S. 430 (1940). *Cf. Illinois v. Gates, Id.* This Court should decline to issue its Writ of Certiorari.

B. Petitioner did not properly present the question of the constitutionality of Wyoming's statute to the Wyoming Supreme Court.

In the Wyoming Supreme Court, Petitioner never suggested that the applicable provisions of the Wyoming statutes with which it was concerned were unconstitutional as such. The Wyoming Supreme Court never addressed the issue of the constitutionality of its probate statute concerning notice to be given to "beneficiaries named in the will." The only reference to the question of due process was made in passing by Chief Justice Cardine in his dissent from the first decision of that Court. (Pet. App. A9). In that dissent, he makes clear that he considered Petitioner a beneficiary named in the will. As such, petitioner was entitled to notice, both as a matter of state and federal law. (Pet. App. A9-A10). However, in the second opinion of the Wyoming Supreme Court, Chief Justice Cardine, writing for the Court, makes

no reference to the Due Process question, but simply states:

> The crux of this case is that any beneficiary of a trust created in a will is not a beneficiary under the will for the purposes of the notice requirements of §§ 2-7-615 and 2-7-205, W.S. 1977. We need make no further categorization of the status of Shriners Hospitals for Crippled Children than to conclude that it was not a "beneficiary under the will."

(Pet. App. B3).

For the Wyoming Supreme Court to have addressed the question of the constitutionality of its statute under the circumstances of this case would be extremely unusual. Rule 5.07, Wyoming Rules of Appellate Procedure, clearly provides:

> In all cases both criminal and civil . . . in which a statute, . . . is alleged to be unconstitutional, . . . counsel shall also serve a copy of their brief upon the attorney general.

In *Ririe v. Board of Trustees of School District No. 1*, 674 P.2d 214, 219 (Wyo. 1983), the Wyoming Supreme Court, quoting *Tobin v. Pursel*, 539 P.2d 361 (Wyo. 1972), stated the obvious reason for such a rule:

> The attorney general, being the chief legal officer of the State, has a duty to protect the interests and the welfare of the people in declaratory judgment actions where statutory constitutional questions are in issue. 539 P.2d at 365.

Failure to comply with the rule can render an appeal of whatever nature vulnerable to dismissal for lack of jurisdiction. *Ririe, supra* at 220. In this instance, although

invited,[12] Petitioner did not serve the attorney general as required, and it must be assumed that such is a basis for the Court's silence on the constitutional issue.

Petitioner has invoked 28 U.S.C. § 1257(a) as the basis for the Court's jurisdiction in this matter. In exercising its jurisdiction under that section, the Court has held that it has no jurisdiction over such issues unless a federal question has been properly presented or determined in the court below. *McGoldrick, Id. Cf. Illinois v. Gates, Id.* Whether it is a question of jurisdiction as illustrated by *McGoldrick* or merely one of prudential restriction as suggested by *Gates,* this case is one in which this Court should decline to issue its writ of certiorari. This Court has stated that:

> . . . when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. . . .

Street v. New York, 394 U.S. 576, 582 (1969). While in *Street,* it was determined that the appellant had affirmatively established the contrary, such is not the case here. In the instant case, petitioner failed to properly present the constitutionality issue to the Wyoming Supreme Court and has failed to affirmatively show that it was so considered. Accordingly, this Court should decline to grant a writ of certiorari for lack of jurisdiction.

---

[12] Briefs for Respondents suggested this deficiency to Petitioner. Petitioner chose not to serve the attorney general. *Cf. Ririe, supra* at 220.

CONCLUSION

For the reasons stated, Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CALVIN E. RAGSDALE
Counsel of Record
MARTY & RAGSDALE
20 East Flaming Gorge Way
Green River, Wyoming 82935
(307) 875-3235

Attorneys for Respondents Rock Springs Grazing Association, Lazy VD Land & Livestock, Elza Eversole and Lois M. Eversole

APPENDIX

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 1. General Provisions
ARTICLE 1. Citation and Construction

§ 2-1-102. Rules of construction and applicability.

(a) This code shall be liberally construed and applied, to promote the following purposes and policies to:

(i) Simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(ii) Discover and make effective the intent of a decedent in distribution of his property;

(iii) Promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors;

(iv) Facilitate use and enforcement of certain trusts.

(b) Unless displaced by the particular provision of this code, the principles of law and equity supplement the code provisions.

(c) This code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

(d) The procedure herein prescribed shall govern all proceedings in probate brought after the effective date of this code. It shall also govern further procedure in proceedings in probate then pending unless the court

determines its application in particular proceedings or parts thereof is not feasible or will work an injustice, in which event the former procedure shall apply.

(Laws 1979, ch. 142. § 1; 1980, ch. 54, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 2. Notices

§ 2-7-205. Parties entitled to receive.

(a) A true copy of the notice required in W.S. 2-7-201 shall be mailed by ordinary United States mail, first class, to:

(i) The surviving spouse, if any, and to all of the heirs at law of the decedent and to all of the beneficiaries named in the will of the decedent. The mailings shall be made not later than one (1) week after the first publication of the notice in the newspaper; and

(ii) Each creditor of the decedent whose identity is reasonably ascertainable by the personal representative within the time limited in the notice to creditors. The mailing shall be made not later than thirty (30) days prior to the expiration of three (3) months after the first publication of the notice in the newspaper.

(b) Unless waived in writing by the parties entitled thereto, the notices required in W.S. 2-7-202, 2-7-203, 2-7-204, 2-7-615, 2-7-806, 2-7-807 and 2-7-811 shall be mailed not less than ten (10) days prior to the day of hearing, the date for filing objections, or sale, as the case

may be, to the surviving spouse, if any, and to all of the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(c) Notice of all intended sales of real property not requiring an order of the court shall be mailed or delivered not less than ten (10) days prior to the sale to the surviving spouse, if any, and to the heirs of a decedent dying intestate or to all of the beneficiaries named in the will of a decedent dying testate.

(Laws 1979, ch. 142, § 1; 1980 ch. 54, § 1; 1989, ch.114, § 1.)

TITLE 2. Wills, Decedents' Estates and Probate Code
CHAPTER 7. Administration of Estates
ARTICLE 4. Marshalling Assets

§ 2-7-402. Title to decedent's property; subject to administration and payment of debts; priorities.

Except as otherwise provided in this code, when a person dies the title to his property, real and personal, passes to the person to whom it is devised by his last will, or in the absence of such disposition to the persons who succeed to his estate as provided in this code. However all of his property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law, and his property, except homestead and other exempt property, is chargeable with the payment of debts and charges against his estate. There is no priority between real and personal property,

except as provided in this code or by the will of the decedent.

(Laws 1979, ch. 142, § 1; 1980, ch. 54, § 1)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-101. Definitions.

(a) As used in this act [§§ 4-8-101 to 4-8-110]:

(i) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;

(ii) "Trustee" means an original, added or successor trustee;

(iii) "Prudent man" means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence,

diligence, discretion, and judgment would act in the management of their own affairs.

(Laws 1965, ch. 54, § 1.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-102. Powers conferred on trustee by sections 4-8-101 to 4-8-110 and limitation thereon; incorporation of parts of sections 4-8-101 to 4-8-110 in instrument which is not a trust.

(a) The trustee has all powers conferred upon him by the provisions of this act [§§ 4-8-101 to 4-8-110] unless limited in the trust instrument.

(b) An instrument which is not a trust within the meaning of section 1(1) [§ 4-8-101(a)(i)] may incorporate any part of this act by reference.

(Laws 1965, ch. 54, § 2.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-103. Powers and duties generally of trustee.

(a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of his powers including the powers granted by this act [§§ 4-8-101 to 4-8-110], a trustee has a duty to act with due regard to his obligation as a fiduciary including a duty not to exercise any power under this act in such a way as to deprive the trust of an otherwise available tax exemption, deduction or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. "Tax" includes, but is not limited to federal, state or local income, gift, estate or inheritance tax.

(c) A trustee has the power, subject to subsections (a) and (b):

(i) To collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(ii) To receive additions to the assets of the trust;

(iii) To continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;

(iv) To acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(v) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(vi) To deposit trust funds in a bank, including a bank operated by the trustee;

(vii) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(viii) To make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(ix) To subdivide, develop or dedicate land to public use; or to make or obtain the vacation of plots and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(x) To enter into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust for any purpose;

(xi) To enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(xii) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(xiii) To vote a security, in person or by general or limited proxy;

(xiv) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(xv) To sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprises;

(xvi) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery; the trustee is liable for any act of the nominee in connection with the stock so held;

(xvii) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(xviii) To borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(xix) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(xx) To pay taxes, assessments, compensation of the trustee and other expenses incurred in the collection, care, administration and protection of the trust;

(xxi) To allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence,

amortization or for depletion in mineral or timber properties;

(xxii) To pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(xxiii) To effect distribution of property and money in dividend or undivided interests and to adjust resulting differences in valuation;

(xxiv) To employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(xxv) To prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(xxvi) To execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

(Laws 1965, ch. 54, § 3.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-105. Effect of sections 4-8-101 to 4-8-110 on power of court; when court authorization required of trustee.

(a) This act [§§ 4-8-101 to 4-8-110] does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this act.

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization (except as provided in subsections (1), (4), (6), (18) and (24) of section 3(c) [§ 4-8-103(c)(i), (iv), (vi), (xviii) and (xxiv)]) upon petition of the trustee. For purposes of this section, in the case of a corporate trustee personal profit or advantage to an affiliated or subsidiary company or association is personal profit to the trustee.

(Laws 1965, ch. 54, § 5.)

TITLE 4. Fiduciaries
CHAPTER 8. Uniform Trustees' Powers Act

§ 4-8-107. Existence of trust powers and proper exercise thereof assumable by third persons; exception.

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the

existence of trust powers and their exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power, and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

(Laws 1965, ch. 54 § 7.)

No. 89-1444

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,
v.
FIRST SECURITY BANK OF UTAH, N.A.,
as Personal Representative for the
Estate of Velma Rife Jones (deceased), *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wyoming

---

REPLY BRIEF FOR PETITIONER

EDWARD F. RUBERRY
Counsel of Record
TIMOTHY J. HARRIS
CARLOS DEL CARPIO
BOLLINGER & RUBERRY
54 West Hubbard Street
Suite 500
Chicago, Illinois 60610-4620
(312) 527-1001
Attorneys for Petitioner, Shriners Hospitals for Crippled Children

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1444

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A.,
as Personal Representative for the
Estate of Velma Rife Jones (deceased), *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Wyoming

---

REPLY BRIEF FOR PETITIONER

I. THE CONSTITUTIONAL QUESTION IS PROPERLY PRESENTED.

In their briefs in opposition, Respondents have made a bevy of arguments to try to persuade the Court that the substantial constitutional issue raised by Petitioner is not properly before the Court. None of these arguments has any force and the foolishness of some of them speaks volumes about Respondents' desperation to keep the court from addressing the merits of this case.

Respondents begin their assault on jurisdiction by arguing that Petitioner did not properly raise its due process challenge before the Wyoming courts. (Buyers Br. at 21-22; Banks Br. at 25-28.) As the attached Appendix E demonstrates, however, the due process is-

sue, and specifically the argument that the trustee was acting under a serious conflict of interest, was squarely presented to the Wyoming courts.[1] Indeed, two dissenting Wyoming Supreme Court justices indicated they would reverse the lower court's ruling precisely on the basis of Petitioner's due process argument. (Pet. App. A9.) That the majority of the Wyoming Supreme Court failed to address explicitly the due process challenge cannot immunize the case from this Court's review. See *Illinois v. Gates*, 462 U.S. 218, 218 n.1 (1988).

Respondents also claim that Petitioners were required under Wyoming law to notify the Attorney General of the pendency of the proceedings because the constitutionality of a Wyoming statute is being challenged. (Banks Br. at 13-15; Buyers Br. at 22-24). The problem with this claim is that no Wyoming statute was or is being challenged here. Petitioner's claim is that their constitutional rights were violated when a Wyoming court approved the sale of property without affording Petitioner notice and hearing. Since no Wyoming statute remotely required the probate court to proceed without notifying the trust's beneficiaries, there is no statute to challenge.

It is this very same misconception about some Wyoming statute being challenged that has led Respondents to claim that this Court's Rule 29.4(c) requires that the petition for certiorari contain a statement that a state statute is being challenged and that 28 U.S.C. § 2403(b) may be applicable. But, again, this is not a case where a statute is being challenged as unconstitutional. The petition for certiorari itself declares this to be the case, as jurisdiction is invoked on the ground that Petitioner

---

[1] The identical claim was advanced before the lower court as well. See R. 746, R. 756, R. 266 (arguing that trustee was preferring interests of the estate and life beneficiary over those of remaindermen); R. 723 and R. 146 (alleging intentional refusal to notify Petitioner).

claims a "title, right, privilege, or immunity . . . under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). See Petition for Certiorari 2 ("decisions rendered by the Supreme Court of Wyoming are repugnant to the Due Process Clause of the Fourteenth amendment to the United States Constitution").

II. THIS MATTER PRESENTS A SUBSTANTIAL QUESTION CONCERNING THE SCOPE OF DUE PROCESS GUARANTEES.

As with the jurisdictional issues, Respondents have attempted to divert the Court's attention from the issue presented. That issue so plainly demands a ruling favorable to Petitioner, that Respondents have chosen to attack the petition on grounds which are either difficult to entertain seriously or not supported by the facts of the case.

Respondents err in arguing that Petitioner has no property interest which is implicated by the sale of the ranch. (Banks Br. at 18, 20.) Yet, Petitioner's property rights in the trust and, in turn, in the estate are well-recognized under state law.[2] For example, no one would suggest that Wyoming could confiscate all charitable trust remainder interests without that constituting a taking of property. *Cf. Hodel v. Irving*, 481 U.S. 704, 717 (1987) (would-be heir of de minimis future interest has standing to challenge statute mandating escheat of said interest).

---

[2] Although Respondents focus heavily on their contention that Petitioner's interest is contingent (Banks Br. at 18; Buyers Br. at 16), that characterization is neither relevant nor accurate. Due process protections attach equally as well to contingent interests as to vested interests. Moreover, the Wyoming Supreme Court, in its opinion on rehearing implicitly recognized Petitioner's interest as vested. (Pet. App. B 3.) Similarly, the Attorney General of Wyoming, in an *amicus* brief filed in the Wyoming Supreme Court, asserted its position that Petitioner's interests are vested.

Respondents attempt to neutralize this common sense property interest by focusing on the role of the trustee, and arguing that the trustee's presence adequately protects the interests of the trust and the Petitioner. It is the obvious reality, however, that the trustee/co-personal representative cannot effectively represent the interests of both the estate and the trust in this matter that gives rise to Petitioner's due process claim.[3] It is precisely due to the conflict arising out of First Security-Utah's dual capacity that the trust and Petitioner's interests were left unrepresented before the judicial proceeding.

That the trustee might have been empowered to sell trust assets without court approval is irrelevant to Petitioner's claim. Had the ranch been sold by the trustee few of the circumstances now giving rise to the violation of Petitioner's due process rights would have come to pass. Since such a sale would have been undertaken without court approval, petitioner's potential cause of action could not have been diminished.[4]

Furthermore, and more significantly, no conflict of interest giving rise to the obligation to notify Petitioner would have arisen. First Security-Utah, as trustee, simply would not have been in the position to sell the ranch to pay its own fees as co-personal representative.[5]

---

[3] It is hardly out of character that in denying the existence of a conflict, Respondent Banks do not even mention the fact that First Security-Utah served as both trustee and co-personal representative. (Banks Br. at 25-28.)

[4] As there would be no court approval, and, thus, no state action, constitutional due process standards would not be applicable. It is clear, however, contrary to the suggestion of Respondent Buyers, that the judicial proceedings in this case, like all judicial proceedings, particularly probate proceedings, constitute state action. *See, e.g., Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

[5] Respondent Buyers dramatically note that Petitioner has not raised Wyoming Statute Section 4-8-105(b), which requires a trustee to seek court approval of a sale where the trustee finds

Petitioner's property interest in its potential cause of action against the trustee has been significantly and directly affected by the judicial proceeding being challenged here. To be sure, Respondents now conveniently insist that the order approving the sale does not have any effect on Petitioner's rights against the trustee. Yet Respondent Banks have previously asserted before the Wyoming Supreme Court that Wyoming Statute § 2-7-620 effectively bars Petitioner from seeking redress for injuries suffered as a result of the sale. (R. 195-227.) The statute itself bars collateral attacks of judicially approved sales of property by personal representatives.

Respondents' suggestion that Petitioner's due process rights have been satisfied by compliance with the notice requirements of the Wyoming statutory scheme is similarly defective. *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950). Certainly, Petitioner's right to notice is not satisfied or suspended merely because the statutory scheme does not require notice to Petitioner. Whether the statutory scheme is reasonable is wholly irrelevant to the due process analysis. Where, as here, due process requires actual notice to an interested party, due process is not satisfied by compliance with "reasonable" statutory notice requirements, where such requirements do not include notice to such party.

In the typical instance, a trustee acts for the benefit of the trust beneficiary and is directly accountable to the

---

itself in a conflict of interest. (Buyers Br. at 18 n.10.) Petitioner acknowledges that it has not done so because the statute is inapplicable where, as here, the sale involved is undertaken by the personal representative. Indeed, if First Security-Utah, as trustee, were to find itself in a conflict of interest, under Wyoming law, First Security-Utah could not sell the ranch without court approval. The statutory scheme provides this safeguard precisely because a conflicted trustee cannot be relied upon to represent the interests of the trust adequately.

beneficiary for all its actions. Typically, also, during the time frame under which the trustee is acting on behalf of and for the beneficiaries, the actions taken by the trustee are known to the beneficiaries and are approved by the beneficiaries, thereby protecting the beneficiaries from unknown wrongful acts of the trustee. None of these safeguards were in place here.

Respondents' further attempt to direct the attention of the Court away from Petitioner's due process claim by arguing the reasonableness of the sale of the ranch. The reasonableness of the sale is, of course, irrelevant to whether Petitioner has been afforded the process which it is due. Nevertheless, it is enlightening to note the frequency with which Respondents assert the failure of Petitioner to cite to evidence supporting its case in the record. It is precisely because Petitioner was denied the opportunity to participate in the proceedings, and later denied the opportunity to conduct discovery that such evidence is scarce (though by no means absent) in the record. Of course, had Petitioner been afforded the opportunity to so participate it would not now be complaining of this violation of its due process rights.

Finally, Respondents' suggestion that Petitioner's is a unique situation is wholly inaccurate. In fact, over 20 charitable organizations thought the issue to be important enough to file supporting *amicus* briefs with the Court. Further, those *amicus* briefs estimate that charities have known charitable remainder interests worth over $5 billion. Charitable remainder trusts constitute one of the major sources of funds for such charities and are intended by the federal government to provide a key mechanism for funding charitable institutions. Moreover, trustees frequently also serve as personal representatives.

The issue presented is plainly substantial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD F. RUBERRY
Counsel of Record
TIMOTHY J. HARRIS
CARLOS DEL CARPIO
BOLLINGER & RUBERRY
54 West Hubbard Street
Suite 500
Chicago, Illinois 60610-4620
(312) 527-1001
Attorneys for Petitioner,
Shriners Hospitals
for Crippled Children

APPENDIX

APPENDIX E

The quotations presented below reflect instances in which Petitioner asserted its conflict of interest/due process claim before the Wyoming courts:

> One-in-the-same corporate entity giving notice from itself, in one fiduciary capacity, to itself, in another fiduciary capacity, can hardly be equated with the constitutional minimum requirement of actual notice to a real party in interest whose property interest may be affected adversely. Instead of making the reasonably diligent efforts to uncover Appellant's identity and its intention to claim its beneficial interest in the real property in kind, as required by the *Tulsa* case, *supra*, the Personal Representatives in this probate almost appear to have been diligently attempting to cover-up Appellant's identity and to ignore Appellant's interest in the real property that is subject to this probate administration.

(Appellant's [Petitioner's] Brief in Support of Petition for Reargument and Rehearing, filed April 4, 1989 in Wyoming Supreme Court, at 15.)

> The material risk of loss to the charitable remainder beneficiaries that could result from fiduciary mismanagement is exacerbated by the fact that one and the same corporate fiduciary is designated as the Personal Representative of the Last Will and Testament of the late Velma Rife Jones and as the Trustee of the testamentary unitrust contained as a part of the provisions of that Will. Under the initial decision of the majority of this Court, an unscrupulous fiduciary serving in such a joint capacity could administer certain aspects of the financial affairs furtively and to the substantial and material detri-

> ment of the charitable remainder beneficiaries, and perhaps never be called to account.

(Appellant's [Petitioner's] Supplemental Brief upon Rehearing filed May 17, 1989 in Wyoming Supreme Court, at 7.)

Chief Justice Cardine, correctly noted in his dissent of the initial Wyoming Supreme Court decision that the Shriners Hospital advanced two arguments, the second argument was that "because of its property interest in the estate, notice is required by the Due Process Clause of the United States Constitution.

(Pet. App. A 9.)

No. 89-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A., Personal Representative of the Estate of Velma Rife Jones; FIRST SECURITY BANK OF ROCK SPRINGS, Resident Personal Representative of the Estate of Velma Rife Jones; ROCK SPRINGS GRAZING ASSOCIATION; LAZY VD LAND AND LIVESTOCK; ELIZA EVERSOLE; and LOIS M. EVERSOLE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wyoming

BRIEF AMICI CURIAE OF AMERICAN COUNCIL ON EDUCATION, AMERICAN HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, NATIONAL ASSOCIATION FOR HOSPITAL DEVELOPMENT, NATIONAL COMMITTEE ON PLANNED GIVING, NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL MASONIC FOUNDATION FOR PREVENTION OF DRUG AND ALCOHOL ABUSE AMONG CHILDREN, AND NATIONAL SOCIETY OF FUNDRAISING EXECUTIVES, IN SUPPORT OF THE PETITIONER

BRUCE R. HOPKINS *
ELYSE I. SUMMERS

STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment guarantees a trust beneficiary notice of a judicial proceeding held to approve the sale of property obligated to the trust in which the beneficiary has a vested remainder interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1444

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A., Personal Representative of the Estate of Velma Rife Jones; FIRST SECURITY BANK OF ROCK SPRINGS, Resident Personal Representative of the Estate of Velma Rife Jones; ROCK SPRINGS GRAZING ASSOCIATION; LAZY VD LAND AND LIVESTOCK; ELIZA EVERSOLE; and LOIS M. EVERSOLE, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Wyoming

---

BRIEF AMICI CURIAE OF AMERICAN COUNCIL ON EDUCATION, AMERICAN HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF JESUIT COLLEGES AND UNIVERSITIES, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, NATIONAL ASSOCIATION FOR HOSPITAL DEVELOPMENT, NATIONAL COMMITTEE ON PLANNED GIVING, NATIONAL INSTITUTE OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL MASONIC FOUNDATION FOR PREVENTION OF DRUG AND ALCOHOL ABUSE AMONG CHILDREN, AND NATIONAL SOCIETY OF FUNDRAISING EXECUTIVES, IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICI CURIAE*

This brief *amici curiae* is filed by the organizations described below, with consent of all parties, as provided for in the rules of this Court.

The American Council on Education, an independent, nonprofit association founded in 1918, represents approximately 1,500 accredited, degree-granting institutions of higher education as well as national and regional higher education associations. Through its programs and activities, and its policy-setting functions, it strives to ensure quality education on the nation's campuses and equal educational opportunity for all Americans.

The American Hospital Association is an nonprofit, national trade association of hospitals whose mission is to promote the public welfare through leadership and assistance to its members in the provision of high quality health care and services. With approximately 5,500 institutional members, it represents a majority of the nations's acute care hospitals.

The Association of American Universities is a nonprofit association, founded in 1900, which represents fifty-six American and two Canadian universities with strong programs of graduate and professional education and research. Approximately half are public institutions and half are private. The Association serves its member institutions through activities designed to encourage timely consideration of major issues affecting academic research and graduate and professional education.

The Association of Jesuit Colleges and Universities is a nonprofit association, established in 1970, which represents the twenty-eight Jesuit colleges and universities in the United States. Through its programs and activities, the Association strives to ensure the quality of education at our nation's Jesuit institutions of higher education.

The Council for Advancement and Support of Education was founded in 1974 through the merger of the American Alumni Council and the American College Public Relations Association. Its membership includes approximately 3,200 colleges, universities, independent elementary and secondary schools, Educational Associates, and Subscribers in the United States, Canada, Mexico, and eighteen other countries. Representing the member institutions are more than 14,000 individual professionals in institutional advancement.

The National Association for Hospital Development is a nonprofit association, founded in 1967, which has as its membership over 2,300 development officers, representing both not-for-profit and for-profit hospitals and hospital medical centers throughout the United States.

The National Committee on Planned Giving is a nonprofit, national professional association of individuals who are interested in the planned giving field. Its membership is composed of planned giving councils of fifteen or more individuals organized throughout the United States. Its current membership includes thirty-nine member councils, which serve approximately 3,500 local members. The Committee engages in a variety of activities, including an active program to encourage the participation in the gift planning process of individuals in professions other than fundraising.

The National Institute of Independent Colleges and Universities is a nonprofit association founded in 1976 to represent the national policy concerns of independent colleges and universities. Presently, Institute members include more than 850 independent colleges and universversities, and more than 40 state-based associations. The Institute conducts research and policy studies on matters of concern to independent higher education.

The National Masonic Foundation for Prevention of Drug and Alcohol Abuse Among Children is a nonprofit, tax-exempt organization devoted to the promotion of greater awareness and prevention of drug and alcohol abuse among America's youth. Its activities focus on funding and sponsoring educational programs to reduce drug and alcohol abuse, including publications, electronic media, and special programs. It is a sponsored charity of the Masonic Grand Lodges nationally, and receives support from charitable remainder gifts from members of the Lodges.

The National Society of Fundraising Executives is a nonprofit association, founded in 1960, which represents over 12,000 professionals engaged in the raising of funds for charitable organizations. The Society represents individual fundraising executives who are employed by charitable organizations as well as those who are professional consultants to charitable organizations. The Society engages in a variety of activities, including the promotion of educational seminars for its membership and the operation of a certification program for fundraising executives.

All of the above-named organizations are concerned with promoting charitable giving, including bequests. Charitable remainder trusts and similar instrumentalities are an important element of charitable giving. In the experience of the organizations named above, without the timely and appropriate notification necessary to protect their interests in trusts (through participation in legal proceedings related to such trusts), charitable beneficiaries of charitable remainder trusts frequently cannot ascertain and protect their vested interests, and experience substantial diminution of such interests.

STATEMENT OF THE CASE

Amici curiae adopt the Petitioner's statement of the case.

REASONS FOR GRANTING THE PETITION

I. CHARITIES' FAILURE TO RECEIVE NOTICE OF THE DISPOSITION OF ASSETS OF CHARITABLE REMAINDER TRUSTS OF WHICH THEY ARE BENEFICIARIES CAUSES A MAJOR DISRUPTION IN THEIR ABILITY TO RAISE, MANAGE AND MAINTAIN FUNDS

The instant case presents a constitutional issue that is of great importance to charities that receive financial support in the form of charitable remainder trusts. These split-interest trusts, which frequently are testamentary, generally provide "for a specified distribution, at least annually, to one or more beneficiaries, at least one of which is not a charity, for life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity." Treas. Reg. § 1.664.1 (1989). The grantor is free to name any independent person or entity as trustee, and often the trustee is the executor of the trustor's estate, a bank or trust company, or other person apart from the charitable beneficiaries.

Bequests in the form of split-interest gifts constitute one of the primary sources of funds for charities of all types. Statistics compiled by the U.S. Department of Education and the Council for Aid to Education indicate that the assets of charitable remainder trusts managed by major colleges and universities approximated $2.3 billion in fiscal year 1988.[1] A study by the Council for Aid to Education estimates that about 5.9 percent

[1] The total as of fiscal 1986 was derived from National Center for Education Statistics, *Financial Statistics of Institutions of Higher Education*, Table 5 (1987). The additions for fiscal 1987 and 1988 are reported in Council for Aid to Education, *Voluntary Support for Education 1987-1988*, at 7-8 (June 1989). The totals are understated since they do not include the many trusts managed by noncharitable trustees, nor do they include trusts unknown to the charities. There is a slight overstatement in the data to the extent that they include a small amount of gift annuities.

of all gifts to major private schools are in the form of charitable remainder gifts.[2]

Other types of charitable organizations, including hospitals and major hospital systems, rely heavily on charitable donations. Charitable giving in fiscal 1987-1988 to member hospitals of the National Association for Hospital Development (NAHD) totaled $2.89 billion, up more than 4 percent from the previous year.[3] While no specific figures regarding split-interest trusts are available for non-educational institutions, these trusts are a considerable source of charitable funds donated to hospitals. For example, Shriners Hospitals reports that it has interests in over 2,300 trusts of which it is aware, with its share of assets totaling approximately $70 million.[4]

For some institutions, charitable remainder trusts provide the single most significant source of charitable funds. For example, Dartmouth University reports that split-interest charitable trusts constitute about 25 percent of all bequests received since 1951. Harvard University received over $95 million in split-interest gifts in fiscal year 1988-1989 alone.[5] Even for those institutions that

---

[2] Council for Aid to Education, *Voluntary Support of Education 1987-1988*, at 7 (June 1989). The estimate also includes a small number of gift annuities which are not in trust.

[3] National Association for Hospital Development, *Report on Giving, FY 1988*, at 1 (1989). These figures represent the annual giving to all NAHD hospitals in the United States and were extrapolated from responses to a member survey conducted by NAHD. This total includes cash donations, non-cash gifts, pledges and planned giving.

[4] Petition at 25. The Baylor University Medical Center Foundation estimates its interests in trusts of this kind are approximately $70 million as well. Telephone conversation with Gordon Caswell, President, Baylor University Medical Center Foundation (April 30, 1990).

[5] Financial Report to the Board of Overseers of Harvard College for the Fiscal Year 1988-1989, at 81 (1989).

do not rely as heavily on split-interest gifts as Dartmouth and Harvard Universities, charitable giving is becoming increasingly important. In an era of cuts in governmental spending, both educational and health care institutions have a greater need for philanthropic dollars. A recent report by the National Science Foundation indicates that colleges and universities are deferring $2.50 of needed construction for every $1.00 of planned expenditures.[6] For hospitals, many of the sources of funding for capital-intensive endeavors have entirely evaporated or been greatly reduced,[7] forcing hospitals to rely more heavily on charitable giving in order to carry out basic hospital functions.[8]

Given the enormous amounts of money involved in these trusts and the increasing financial pressure on

---

[6] Statement by Joe B. Wyatt, Chancellor, Vanderbilt University, on behalf of the American Council on Education, before the Committee on Ways and Means, U.S. House of Representatives, at 8 (March 5, 1990).

[7] The Hill-Burton program, once a major source of funding for hospital expansion and modernization, is no longer a significant factor. *See* Note, *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor*, 39 Md. L. Rev. 316, 346 (1979). Average patient operating margins under the Medicare Prospective Payment System continue to hover precariously low. As a result, the ratio of hospital bond downgradings far exceed upgradings, Standard & Poor's Health-Care Revenue Bonds Credit Review (April 18, 1988), making it difficult for hospitals to finance needed improvements. Furthermore, Medicare capital payments to hospitals have been reduced by 15 percent for rural and urban hospitals, Omnibus Budget Reconciliation Act of 1989, P.L. No. 101-239, § 6002, 103 Stat. 2106, 2140 (1989), and an additional 10 percent reduction for urban hospitals has been proposed. U.S. Dept. of Health and Human Services, The Fiscal Year 1991 Budget at 46-47.

[8] American Hospital Association, Policy and Statement: *Hospital Philanthropy* (August 6, 1986). The NAHD's *Report on Giving, FY 1988* indicates that the three highest categories for expenditures of charitable giving were construction and renovation, research and teaching, and equipment. *Id.* at 6.

charities, it is imperative that the Court require trustees to notify charitable remainder beneficiaries of proposed sales and investment decisions that substantially affect their interests. Charities are frequenty not notified of the existence of a charitable remainder trust until after the last income beneficiary dies, which can be years after the death of the grantor and years after the disposition of substantial trust assets.

The lack of timely and adequate notice has a severe adverse effect on charities. Neither the probate courts nor the state attorneys general have the staff or the time to supervise these trusts. Life beneficiaries receive notice of the trust no later than their receipt of the first income distributions, and these individuals often place tremendous pressure on trustees to administer the trusts in ways that will favor their income interests at the expense of the remaindermen. This situation is akin to the prohibition on *ex parte* communications during the pendency of a lawsuit. Whether the life beneficiaries' requests are appropriate and consistent with the intent of the grantor are questions that are best considered under the vigilant eye of all parties having an interest in the assets of the trust.

This Court has traditionally been sensitive to the problems of charities in raising funds and has, in light of their unique contribution to American society, consistently and conscientiously provided charities their due constitutional protection. *See, e.g., Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). In the case before the Court, the very ability of charities to raise, manage and maintain funds is at risk as a result of the lower court's opinion, and it is therefore necessary and proper for this Court to set forth the rights of charitable remainder beneficiaries under the Due Process Clause of the Fourteenth Amendement to the United States Constitution.

II. THE LOWER COURT'S OPINION CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND CONFLICTS WITH DECISIONS OF THIS COURT AND OF LOWER COURTS

In a series of cases, this Court has established that "state action affecting property must generally be accompanied by notification of that action: 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 484 (1988) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). *See also Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)). The opinion of the lower court contravenes the procedural due process requirement of the Federal Constitution and is in direct conflict with the rulings of this Court in *Tulsa Professional Collection Services*, *Mullane*, and *Mennonite Board of Missions*.

The Wyoming Supreme Court deprived Shriners Hospitals of all notice and hearing rights because it interpreted the statutory notice provisions requiring notice to "beneficiaries named in the will" to exclude beneficiaries of a testamentary trust created by the will. *Estate of Jones*, 782 P.2d 229 (Wyo. Sup. Ct. 1989). This distinction is all form and no substance. The Wyoming Supreme Court denied the right to notice to the main beneficiaries of the estate simply because the will placed their interests in trust, while relatively minor general or specific legatees of small cash bequests were determined to be entitled to full notice and hearing rights. In reaching this conclusion, the Wyoming Supreme Court majority implicitly determined that the due process rights of Shriners Hospitals were not violated. It should have realized that its determination that Shriners Hospitals was not a beneficiary named in the will was an insufficient

reason for denying notice to the charitable remaindermen.

In *Tulsa Professional Collection Services* the probate court attempted to truncate the right to notice and hearing on the claims of creditors of the estate by means of an artificially short statute of limitations. This Court held that the creditors' rights to notice and hearing superseded the probate statute of limitations, reaffirming the principle that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party . . . if its name and address are reasonably ascertainable." *Id.*, 485 U.S. at 485 (quoting *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983)) (emphasis in original). The creditors in *Tulsa Professional Collection Services* were not beneficiaries named in the will, but nonetheless were deemed to hold protected constitutional interests in the property of the estate. Whether or not charitable remaindermen are "beneficiaries named in the will," therefore, is irrelevant to a determination of whether they are entitled to notice of judicial proceedings affecting their interests in trust.

Nor is the fact that Shriners Hospitals was a remainderman significant for due process purposes. In *Mullane*, the trustee of a common trust fund petitioned for a judicial settlement of accounts. The only notice of the petition given beneficiaries, both known and unknown, was by publication. This Court set aside the lower court's approval of the accounts, holding that notice by publication "is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving persons whose whereabouts are also known of substantial property rights." *Id.*, 339 U.S. at 320.

In *dicta*, this Court suggested that it might not be necessary under the Due Process Clause to give personal notice to beneficiaries with future interests. *Id.* at 317. This suggestion, however, was in the context of a dis-

cussion of beneficiaries whose interests were "conjectural" or "so remote as to be ephemeral." *Id.* Although the interests of the charitable remaindermen are, by definition, future, they clearly are not conjectural or ephemeral.[9] Moreover, unlike *Mullane*, where there were numerous beneficiaries, here there were three vested beneficiaries. Any distinction entitling income beneficiaries but not charitable remaindermen to personal notice is constitutionally suspect, especially because the remaindermen often have a greater financial interest in the trust. The general reasoning of *Mullane*, that personal notice must be given to persons whose interests and whereabouts are known or reasonably ascertainable, is equally applicable to both income beneficiaries and charitable remaindermen. The *Mullane* opinion plainly requires that charitable remaindermen be notified of judicial proceedings that might have a substantial impact on their interests in trusts.

Furthermore, in *Mullane*, this Court rejected the contention that notice to a trustee is necessarily sufficient to protect the due process rights of trust beneficiaries. To the contrary, this Court recognized that where the trustee's interests were adverse to those of the beneficiaries, personal notice to known and reasonably ascertainable beneficiaries was required. *Id.* at 316-17. In the case before the Court, First Security Bank of Utah was both personal representative and trustee, and it would have been impracticable for it to adequately represent the special interests of the remainder beneficiaries of the trust, while at the same time representing the income beneficiary and all the other beneficiaries of the will.

---

[9] Under the Internal Revenue Code of 1986, as amended, tax deductions are allowed when the remainder interest of a charity is real and capable of reasonable valuation on the effective date of the creation of a trust (in the case of a testamentary trust, the date of death). 26 U.S.C. §§ 664, 2055; Treas. Reg. § 1.664-1 *et seq.* The concreteness of Shriners Hospitals' interest is evidenced by the fact that a tax deduction was claimed on the death of the grantor. Petition at 3, n.2.

The opinion of the court below is also in conflict with decisions of other state appellate courts that have considered the issue in light of *Mullane*. In *Estate of Reed*, 259 Cal. App. 2d 14, 66 Cal. Rptr. 193 (1968), the court held that the charitable beneficiaries of a testamentary trust must be given notice by mail of all judicial proceedings affecting their interests. The court specifically stated that notice to the bank serving as both trustee and executor was not binding on the charitable beneficiaries. According to the court, "when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties. . . . '[A] judgment in favor of one claimant for part of the property or fund would necessarily determine the amount or extent which remains available to the others.'" *Id.* at 198 (quoting *Bank of California v. Superior Court*, 16 Cal.2d 516, 521, 106 P.2d 879 (1940)). This principle was affirmed as to remaindermen of testamentary trusts in *Estate of Lacy*, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 (1975).

CONCLUSION

As this brief *amici curiae* demonstrates, charities have clear, valuable, economic interests in the assets of split-interest trusts, which they must be entitled to protect through receipt of timely, written notice. Because the Wyoming Supreme Court's decision does not provide for notice to charitable remaindermen, it violates the Due Process Clause of the Fourteenth Amendment. For this reason, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE R. HOPKINS *
ELYSE I. SUMMERS

STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Amici Curiae

* Counsel of Record

No. 89-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF FOR AMERICAN NATIONAL RED CROSS, UNITED WAY OF AMERICA, SALVATION ARMY, NATIONAL AUDUBON SOCIETY, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN COLLEGE COALITION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF HOMES FOR CHILDREN, UNITED CHURCH OF CHRIST, AND INDEPENDENT SECTOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

*WALTER B. SLOCOMBE
ALBERT G. LAUBER, JR.

CAPLIN & DRYSDALE, Chartered
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

Attorneys for *Amici Curiae*

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment guarantees a trust beneficiary notice of a judicial proceeding held to approve an estate's sale of property left to a trust in which the beneficiary has a vested remainder interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1444

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

---

BRIEF FOR AMERICAN NATIONAL RED CROSS, UNITED WAY OF AMERICA, SALVATION ARMY, NATIONAL AUDUBON SOCIETY, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN COLLEGE COALITION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF HOMES FOR CHILDREN, UNITED CHURCH OF CHRIST, AND INDEPENDENT SECTOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici curiae are publicly-supported charitable organizations whose objectives include relief of disaster victims,

the conduct of blood services programs, and biomedical research; conservation of wildlife and natural resources; care and service to children and families in crisis; relief of the poor; advancement of education; and promotion of mental, spiritual, and religious health.[1] *Amicus curiae* Independent Sector was formed in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiative. Among its 700 members are many of the major philanthropic and national voluntary organizations in the country.[2] All *amici* are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code[3] and are qualified to receive tax-deductible charitable contributions under sections 170(c)(2) (income tax), 2055 (estate tax), and 2522 (gift tax).

Amici seek to promote charitable giving, including bequests. Charitable remainder trusts and similar instruments are an extremely important element in charitable giving, especially in the estate-tax context. In *amici's* experience, charities that are the vested beneficiaries of such trusts frequently have difficulty in learning of their entitlements. Absent notice of pending judicial proceedings affecting the trusts, charities are often denied the opportunity to be heard concerning transactions that vitally affect their interests.

Counsel for all parties have consented to the filing of this brief. Letters of consent are on file with the Clerk.

STATEMENT

1. Charitable remainder trusts ("CRTs"), often called "split-interest trusts," are an extremely common method

---

[1] A more detailed description of each *amicus* appears in the Appendix.

[2] Independent Sector acts in this matter through its board of directors; its filing this brief does not imply that each of its member organizations has taken a position on the question presented here.

[3] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1986 (26 U.S.C.), as amended ("the Code" or "IRC").

of making charitable gifts. Such trusts may be either testamentary or *inter vivos*. Under the typical pattern, a donor transfers property to an irrevocable trust, granting an income interest to family members (or retaining it herself) for life or a specified term of years. At the death of the life tenant or the expiration of the term, all property in the trust passes to one or more charitable remaindermen.

CRTs are usually structured to enable the donor (either the individual or her estate) to secure a current tax deduction for the value of the property that will ultimately pass to charity. To secure such tax benefits, a CRT must be drafted in strict compliance with Internal Revenue Code requirements. *See* IRC §§ 664, 2055(e)(2)(A). These provisions are designed to ensure that the value of property that actually passes to charity corresponds to the tax deduction claimed when the trust was established. *See* S. Rep. No. 552, 91st Cong., 1st Sess. 87 (1969). This means that the charity's remainder interest must be vested, *i.e.*, not subject to defeasance or diminution by the exercise of powers of invasion or contingencies not susceptible of actuarial quantification.[4]

2. Petitioner Shriners Hospitals for Crippled Children is exempt from federal income tax under section 501(c)(3) of the Code. It was one of two named charitable beneficiaries of a qualified CRT created by the will of a Utah decedent. The life interest was held by the decedent's sister, aged 81 when probate commenced. The decedent's federal estate

---

[4] If a CRT complies with tax Code requirements (a "qualified CRT"), the donor or her estate is entitled to a charitable contribution deduction in an amount equal to the actuarially-determined present value of the charitable remainder. This sum is computed by reducing the gross amount of the gift by the expected value of the life tenant's interest, calculated by use of unisex actuarial tables set forth in the regulations. Treas. Reg. § 1.664-4(b)(5). The CRT itself is exempt from federal income tax for the life of the trust (except on unrelated business taxable income). IRC § 664(c).

tax return claimed a charitable contribution deduction, in the amount of $875,038, for property transferred to the trust (R. 862).

Respondent First Security Bank of Utah occupied the dual roles of executor under the will and trustee of the CRT.[5] Respondent did not notify petitioner or the other trust beneficiaries of the decedent's death or of the commencement of probate proceedings. Indeed, petitioner was not even aware that the trust existed until after the events complained of here. Pet. App. A2-A3.

The principal asset of the estate was a ranch in Wyoming. Shortly after the will was admitted to probate, respondent sought approval of the Wyoming probate court to sell the ranch to a group of local investors. In its petition, respondent stated that it had given notice of the proposed sale to five specific devisees under the will, and to itself as trustee of the CRT. Neither petitioner nor the other two trust beneficiaries received formal notice of the proposed sale, either from respondent or the probate court (Pet. App. A4). It appears, however, that respondent discussed the sale informally with the life tenant and the other charitable remainderman (R. 499). The probate court granted its approval and the sale was consummated.

Several months later, petitioner learned from sources other than respondent that it was a beneficiary under the will and that the principal asset destined to fund the CRT had been sold with court approval. Petitioner filed this action in Wyoming District Court seeking to vacate the order approving the sale, contending that the probate court's approval, without notice to the vested trust beneficiaries, violated the Wyoming probate code and the

---

[5] Respondent's Wyoming affiliate, First Security Bank of Rock Springs, assisted in handling ancillary probate matters involving the estate's Wyoming assets. For the sake of convenience, we will refer to the banks collectively as "respondent."

Due Process Clause of the Fourteenth Amendment (R. 131-136, 142-166, 563-567, 569, 718, 736-737). The trial court denied relief without addressing petitioner's federal constitutional claims (Pet. App. C).

A divided Wyoming Supreme Court affirmed (Pet. App. A & B). Although Wyoming law requires probate courts to notify "all of the beneficiaries named in the will" of proposed sales of an estate's real property, the Court held that this provision does not require notice to charitable remaindermen like petitioner. "The crux of this case," the Court stated, "is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of [Wyoming's] notice requirements" (Pet. App. B3). Although petitioner reiterated its federal constitutional claims in the initial hearing before the Wyoming Supreme Court (*see* Pet. App. A9 (Cardine, C.J., dissenting)) and in its supplemental brief on rehearing (*see id.* at B4 (Rooney, J., dissenting)), the majority of that Court, like the District Court, rejected those contentions *sub silentio*.

Because it was denied notice of the probate proceeding, petitioner had no opportunity to bring several relevant points to the probate court's attention. These include petitioner's allegations: (1) that respondent had a potential conflict of interest, owing to its divergent duties to the estate's creditors and legatees, to the life tenant of the trust, and to the charitable remaindermen; (2) that the proposed sales price was 30% below the figure at which respondent itself had appraised the ranch when commencing probate; (3) that the proposed sales price reflected no compensation for subsurface mineral rights, despite the ranch's proximity to a proven natural gas field; (4) that the estate had sufficient liquid assets to render sale of the ranch unnecessary; and (5) that petitioner, possibly unlike other beneficiaries of the CRT, was willing to accept distribution of the real estate in kind.

REASONS FOR GRANTING THE PETITION

This case is of great importance, not only to the Nation's charities, but also to the Federal Government, both in its regulatory capacity and in its role as a potential beneficiary of charitable trusts. The decision of the Wyoming Supreme Court squarely conflicts with this Court's decisions concerning the requirements of the Fourteenth Amendment's Due Process Clause, and also conflicts, either directly or in fundamental principle, with the holdings of other state supreme courts. Certiorari is clearly warranted under these circumstances and, given the plain conflict with this Court's precedents, the Court may wish to consider summary reversal.

1. The decision of the Wyoming Supreme Court directly conflicts with this Court's decisions in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). Those cases enunciate the now-familiar proposition that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, 339 U.S. at 314; *Mennonite Board*, 462 U.S. at 795; *Tulsa Professional*, 485 U.S. at 484. These cases squarely hold that persons with interests in property (including trust beneficiaries, as in *Mullane*) are entitled to notice by mail of judicial proceedings that may adversely affect their interests (including judicial sales and probate proceedings, as in *Mennonite Board* and *Tulsa Professional*, respectively), so long as the identity and whereabouts of such individuals are "known or reasonably ascertainable." *Tulsa Professional*, 485 U.S. at 491; *Men-*

nonite Board, 462 U.S. at 800; *Mullane*, 339 U.S. at 318-320.

All of the factors required to trigger notice under the Due Process Clause, as construed in these decisions, are present here. The Wyoming probate court's approval of respondent's proposal to sell trust property plainly constitutes "state action."[6] As the vested remainderman of a trust, petitioner possessed a property interest that could be "adversely affected" (*Tulsa Professional*, 485 U.S. at 485) or "subject to diminution" (*Mullane*, 339 U.S. at 313) by the proposed sale.[7] Finally, petitioner's identity and whereabouts were obviously "known or reasonably ascertainable" by respondent. Not only is petitioner a nationally recognized hospital; it was a named beneficiary of a trust of which respondent was trustee, created by a will of which respondent was executor.

In rejecting petitioner's due process challenge, the Wyoming Supreme Court evidently concluded that

---

[6] *See Tulsa Professional*, 485 U.S. at 486: "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." Indeed, the existence of state action here follows *a fortiori* from *Tulsa Professional*. The Court there held that the state's "pervasive and substantial" involvement in the overall probate process was enough to constitute "state action," even though the probate court was not asked to approve any particular transaction (*id.* at 487). Here, by contrast, the probate court was asked to approve, and actually did approve, respondent's sale of trust property.

[7] Petitioner's property interests could be affected adversely in two ways. First, sale of the ranch at a price below its fair value would proportionately reduce the value of petitioner's vested remainder. Second, the probate court's approval of the sale could cut off or complicate petitioner's cause of action against respondent for mismanagement of the trust. *See Mullane*, 339 U.S. at 313 (noting that judicial approval of trustee's accounting "may cut off [the beneficiaries'] rights to have the trustee answer for negligent or illegal impairments of their interests"); Wyo. Stat. Ann. § 2-7-620 (apparently barring collateral attacks on judicially-approved probate sales).

respondent's notice to itself, as trustee of the CRT, was constructive notice to the trust beneficiaries sufficient for due process purposes. This Court in *Mullane* rejected precisely that argument. The defendant in that case was a trustee seeking judicial approval for its accounting of trust income and disbursements. The Court acknowledged the general rule that a trustee, as a fiduciary and "caretaker" for the beneficiaries, is generally competent to act for them (339 U.S. at 316). Yet the Court held that the nature of the proceeding required that the beneficiaries be personally notified, since "it is their caretaker who in the accounting becomes their adversary" (*ibid.*).

In *Tulsa Professional*, the Court made the same point in the probate context. It noted that an executor has potentially conflicting duties to legatees and creditors of the estate, and it held that such a conflict underlines the need for actual notice enabling creditors personally to protect their interests.[8] Because respondent in the instant case, given its twin capacities as executor and trustee, had potentially conflicting duties to the estate's beneficiaries, to the trust's life tenant, and to the charitable remaindermen, respondent's notice to itself did not constitute notice to petitioner adequate under the Due Process Clause.

This Court has emphasized that the Fourteenth Amendment requires individualized notice except in those unusual circumstances where the persons to be notified are extremely numerous and difficult to locate. In *Mullane*, the defendant served as common trustee of 113 trusts with thousands of beneficiaries (339 U.S. at 309). While insisting upon notice by mail to "known [beneficiaries] whose where-

---

[8] *See* 485 U.S. at 489: "[T]he executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting."

abouts are also known" (*id.* at 320), the Court ruled that notice by publication sufficed for "contingent beneficiaries," beneficiaries whose interests were "so remote as to be ephemeral," and "beneficiaries whose interests are either conjectural or future or * * * do not in the ordinary course of business come to the knowledge of the common trustee" (*id.* at 317-318). The Court in *Tulsa Professional* similarly stated that "it is reasonable to dispense with actual notice to those with mere 'conjectural' claims" and those whose identities are not "reasonably ascertainable" (485 U.S. at 490, 491).

In this case, it is clear that personal notice by mail to petitioner was constitutionally required. Petitioner had a remainder interest in the trust that was presently vested in right; its claim was neither contingent, ephemeral, conjectural, or remote. Although petitioner's interest was a "future interest" in the sense that its possession of the trust property was temporally deferred, even petitioner's right to possession was not "future" by much, since the sole life tenant was 81 when probate commenced and died soon thereafter.[9]

---

[9] This Court in *Mullane* by no means suggested that holders of future interests are disentitled as a class to notice under the Due Process Clause. The Court mentioned future interests, rather, as examples of interests that might be so conjectural, or so difficult for the trustee to ascertain, as to make notice by publication the only feasible course. The Court's actual holding in *Mullane* was that the Due Process Clause prohibits a state from "depriving *known persons whose whereabouts are also known* of substantial property rights," without reference to the present or future character of such beneficiaries' claims (339 U.S. at 320 (emphasis added)). In *Mennonite Board*, the Court stated that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, * * * if its name and address are reasonably ascertainable" (462 U.S. at 800 (emphasis original)). Indeed, the property interests at stake in *Mennonite Board* (a mortgage-holder's lien) and in *Tulsa Professional* (a contract right of action) were species of future interests, yet the Court held both entitled to due process protection. Any distinction

Most importantly, there were only three beneficiaries of the instant charitable remainder trust, and all three were known to respondent. This was not a case where the "character of the proceedings" entailed "frequent investigations into the status of a great number of beneficiaries" (*Mullane*, 339 U.S. at 317). Nor is there any other reason to suppose that actual notice to the two charitable remaindermen would have been "so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted" (*Tulsa Professional*, 485 U.S. at 490).

2. The decision of the Wyoming Supreme Court also conflicts, either directly or in fundamental principle, with the decisions of other state supreme courts. In *McKnight v. Boggs*, 253 Ga. 537, 322 S.E.2d 283 (1984), the Georgia Supreme Court held that the Due Process Clause mandates notice of probate proceedings to persons with an inchoate interest in an estate's property—in that case, beneficiaries of another purported will of the same decedent. The court held that "an inchoate interest in real property [is] a legally protected interest" and that "under *Mullane*, * * * it is clear that due process prohibits deprivation of property without notice and an opportunity to be heard." 322 S.E.2d at 283-284.

In *Lilly v. Duke*, 376 S.E.2d 122 (W.Va. 1988), the West Virginia Supreme Court, following this Court's decision in *Mennonite Board*, held that the Fourteenth Amendment mandates notice to beneficiaries of a deed of trust prior to a sheriff's tax sale of the realty. Citing *Mullane*, the court concluded: "Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice." 376 S.E.2d at 125.

---

between an income interest in a trust and a vested remainder interest would be wholly untenable for Fourteenth Amendment purposes.

In *Palazzi v. Estate of Gardner*, 32 Ohio St. 3d 169, 512 N.E.2d 971 (1987), the Ohio Supreme Court, in considered dictum, concluded that the Due Process Clause requires actual notice of probate proceedings to nonresident, contingent beneficiaries of an estate. The claimant there was an heir who would take through intestacy if the will were invalidated. Citing *Mullane*, the court reasoned that a claim "to a portion of the assets of [an] estate clearly amounts to an assertion of a property interest under a traditional due-process analysis." "It is immaterial," the court stated, "whether the alleged property interest is characterized as vested or contingent." 512 N.E.2d at 974.

We have discovered no decisions of state supreme courts involving the exact fact pattern here, namely, a fiduciary's failure to notify charitable remaindermen of judicial proceedings affecting their rights. The California appellate courts, however, have held that notice in very similar circumstances is constitutionally required. In *Estate of Reed*, 259 Cal. App. 2d 14, 66 Cal. Rptr. 193 (Ct. App. 2d Dist. 1968), a bank serving as executor and trustee failed to notify charitable residuary beneficiaries of judicial proceedings held to approve transactions in trust property. The court ruled the lack of notice unconstitutional, citing *Mullane* for the proposition that "when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties" (66 Cal. Rptr. at 198). The court specifically held that "notice given to the bank as trustee and executor [was] not binding on the [charitable] beneficiaries," noting the bank's potentially conflicting duties. *Id.* at 199 n.3.[10]

---

[10] *Accord*, *Estate of Lacy*, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 (Ct. App. 2d Dist. 1975) (requiring notice to remaindermen of judicial proceeding held to settle trustee's account). Other state courts have reached similar results without specific reliance on the Federal Constitution. *E.g.*, *Azarian v. First National Bank*, 383 Mass. 492, 423

3. The question presented is of great importance to the Nation's charities. Charitable remainder trusts and other "split-interest" trusts represent a major source of funds for amici and other philanthropic organizations. The National Audubon Society estimates that charitable remainders and other deferred gifts represent about 25% of the total contributions it receives. Many of Independent Sector's members—especially universities, hospitals, social-welfare organizations, and religious groups—derive a substantial part of their endowments from such gifts.

CRTs owe their popularity to their convenience and tax advantages. They enable a donor, in a single instrument, to make a sizable charitable contribution and, at the same time, provide for the support of family members during their lifetimes. Despite retention of such income rights, the donor or his estate is entitled to an immediate tax deduction for the actuarially-determined present value of the charitable remainder. One index of CRTs' popularity is the frequency with which their benefits are emphasized in the estate planning literature.[11]

N.E.2d 749 (1981) (requiring notice to trust beneficiaries of judicial proceeding held to settle trustee's account, citing state trust law); *In re Trusts Created by Hormel*, 282 Minn. 197, 163 N.W.2d 844 (1968) (requiring notice to trust beneficiaries of judicial proceeding held to consider replacement of trustee, citing state constitution).

[11] *See, e.g.*, Colburn, *Securing Tax Benefits from Charitable Remainder and Charitable Lead Trusts*, 16 Estate Plan. 154 (1989); Raabe & Boucher, *Using Charitable Remainder Trusts in the Estate Plan*, 13 Rev. Tax. Indiv. 3 (1989); Popovich, *Charitable Remainder Unitrusts in Estate Planning*, 15 Pepperdine L. Rev. 367 (1988); Teitell, *The Internal Revenue Service Has Issued Model Agreements for One-Life Inter Vivos Charitable Remainder Unitrusts*, 128 Trusts & Estates, May 1989, at 56 ; Wilson & Simmons, *Charitable Lead Trusts & Charitable Remainder Trusts*, 1 Probate & Prop. No. 6, 23 (1987); Hoffman, *Tax Planning with Charitable Trusts*, 16 Colo. Law. 1958 (1987); Darling, *The Charitable Remainder Trust as an Estate Planning Tool*, 44 N.Y.U. Inst. Fed. Tax. 57 (1986); Hicks, *Charitable Remainder Trusts as Retirement Vehicles*, 10 Estates, Gifts & Trusts J. 143 (1985); Wei-

The IRS has advised, in response to a FOIA request, that more than 36,000 CRTs filed federal tax returns on IRS Form 5227 during 1988. Knowledgeable experts in the field estimate that between 3,000 and 4,000 new CRTs are created annually. Although the aggregate value of assets held in such trusts is difficult to determine precisely, it is safe to assume that this figure is well in excess of $5 billion. A recent sampling of 15 bank and trust companies revealed that they serve as trustees for 3,125 CRTs, with aggregate assets in excess of $725 million.[12] In 1986, colleges and universities alone were beneficiaries of CRTs with assets in the range of $1.6 billion;[13] that figure can be expected to have grown to $2.7 billion by now through subsequent gifts and market-value appreciation. The Council for Aid to Education estimates that the amount of deferred gifts (principally CRTs) to some 1,100 private educational institutions during 1987 totalled $425 million—about 11% of all gifts by individuals to such institutions during that year.[14] As charities place increased emphasis on "planned giving," the rapid growth in assets held by CRTs will likely continue.

Despite the importance of CRTs to charities, most states do not require that charitable remaindermen be notified of the commencement of probate proceedings or of trust transactions (such as asset sales) that may vitally affect

---

thorn, *Using the Charitable Remainder Trust as a Sophisticated Contribution Technique*, 43 N.Y.U. Inst. Fed. Tax. 17 (1985); Lichter, *Profiles in Philanthropy: Opportunities for Gifts*, 124 Trusts & Estates, Sept. 1985, at 22; Stern, *The Split-Interest Trust as a Charitable Giving Vehicle*, 42 N.Y.U. Inst. Fed. Tax. 28 (1984); Schmolka, *Income Taxation of Charitable Remainder Trusts*, 40 Tax L. Rev. 5 (1984).

[12]Estes, *Managing Charitable Assets*, Fund Raising Management 26-36 (Feb. 1990).

[13] National Center for Education Statistics, *Financial Statistics of Institutions of Higher Education*, Table 5 (1986).

[14] Council for Aid to Education, *Voluntary Support of Education 1977-1988*, at 7 (June 1989).

charities' interests. Only two states have statutes specifically requiring notice to charities in circumstances like those here—California and New York.[15] A few states have no relevant notice provision or provide expressly that notice is not required.[16] But most state laws do not specifically address the question of notice to CRT beneficiaries. Rather, they provide generally that the executor or probate court must furnish notice of probate proceedings to "devisees" or "devisees and legatees,"[17] to beneficiaries "named in the will,"[18] or to "interested persons."[19] As is clear from the Wyoming Supreme Court's decision here, it is anybody's guess whether a state court would construe the latter terms to include charitable remaindermen. Some states require that the attorney general[20] or other gov-

---

[15] *See* Cal. Prob. Code § 1208 (1990) (requiring notice to trust beneficiaries where trustee also serves as executor); N.Y. Surr. Ct. Prac. Act § 1904 (1967) (requiring notice to remainderman concerning disposition of trust property). *See also* Ohio Rev. Code Ann. § 5303.22 (1989) (requiring notice to "persons interested" in sale of an estate's property).

[16] *E.g.*, Fla. Stat. Ann. § 733.613 (1976) (executor not required to provide notice of sale of trust property); Ind. Code Ann. § 29-1-15-15 (1989) (same); Ill. Ann. Stat. ch. 110½, ¶ 6-10 (1989) (executor not required to notify trust beneficiaries that probate has commenced). *Cf.* Utah Code Ann. § 57-1-25 (1989) (requiring notice by publication of proposed sale of trust property).

[17] *E.g.*, Ariz. Rev. Stat. Ann. § 14-3705 (1989); Kan. Stat. Ann. §§ 59-2209, 59-2222 (1983); Mass. Gen. Laws Ann. ch. 192, § 12 (1958); Nev. Rev. Stat. Ann. § 136.100 (1986); Or. Rev. Stat. Ann. § 113.145 (1984); S.C. Code Ann. § 62-3-403 (1987); S.D. Codified Laws Ann. § 30-6-8 (1984); Wash. Rev. Code Ann. § 11.28.237 (1987). *Cf.* Tex. Prob. Code Ann. § 128A (1990) (notice *inter alia* to "a charitable organization • • • named as a devisee").

[18] *E.g.*, Wyo. Stat. Ann. § 2-7-205 (1989).

[19] *E.g.*, Neb. Rev. Stat. § 30-2222 (1985); Va. Code Ann. § 64-1-82 (1986); W. Va. Code § 41-5-5 (1982); Wis. Stat. Ann. § 879.03 (1989).

[20] *E.g.*, N.J. Civ. Prac. Rule 4:80-8 (1989); Or. Rev. Stat. Ann. § 128.720 (1984); R.I. Gen. Laws § 18-9-13 (1988); Tex. Prob. Code Ann. § 123.001 (1987).

ernmental agency[21] be notified of transactions affecting CRTs, but such officials, in practice, rarely communicate notice to charities directly.

Amici believe that providing notice to charitable beneficiaries of judicial actions substantially affecting their rights—particularly the commencement of probate proceedings and sales of significant trust assets—would materially increase the value of property that charities ultimately receive from CRTs. In *amici's* experience, it is common for trustees of CRTs also to serve as executors of the corresponding estates, making potential conflicts of interest less the exception than the rule. Under the current patchwork of state-law notice provisions, such CRTs are often administered for years—even decades—without the charitable remainderman's even knowing of the trust's existence. Only after all income beneficiaries die, or the life tenants' interests otherwise terminate,[22] do trustees of CRTs typically inform charitable remaindermen of their entitlements. By then, the passage of time will often have made it impracticable for charities to challenge actions that may have affected them adversely.

4. The question presented here is also of importance to the United States. It is not uncommon for agencies of the Federal Government, such as the National Parks Service and the Forest Service, to receive remainder interests in CRTs funded with farmland or other realty. *Amicus* American National Red Cross, a congressionally-chartered charity that is also a federal instrumentality, receives charitable remainders and other deferred gifts in the range of $30 million annually. In such instances, the United States has

---

[21] *E.g.*, Va. Code Ann. § 55-29 (1986) (trustee of CRT must make annual accounting to county or city commissioner); Vt. Stat. Ann. tit. 14, § 2501 (1974) (same, to probate court).

[22] The Internal Revenue Code allows qualified CRTs to have income interests for up to 20 years. IRC § 664(d)(1)(A).

a direct pecuniary interest in receiving notice of relevant probate proceedings.

The decision of the Wyoming Supreme Court also affects the United States in its regulatory capacity. Congress has expressed a sharply defined policy that charities receive the full value of property destined to them through trust arrangements. The Government has an interest in maintaining the integrity, not only of the charitable contribution deduction, but also of the regulatory scheme that Congress has adopted to hold fiduciaries accountable for misfeasance in connection with CRTs.

Prior to 1969, there were manifold opportunities for abuse in making split-interest gifts to charity, enabling donors unjustly to claim tax deductions vastly in excess of the amounts charities ultimately realized. The Treasury Department accordingly recommended enactment of "specific requirements which will ensure that the charity will actually receive that portion of the property for which a deduction is allowed." U.S. Treasury Dept., *Tax Reform Studies and Proposals (Part 2)*, 91st Cong., 1st Sess. 183 (1969). Congress responded by enacting Code sections 664 and 2055(e)(2), restricting charitable deductions for remainder interests to two statutorily-defined types of trusts: annuity trusts and unitrusts.

These provisions are designed to "ensure that there is a direct relationship between the deduction claimed and the charitable benefit involved." *Tax Reform Studies*, *supra*, at 183. They preclude charitable deductions where "it is not probable that the gift will be ultimately received by the charity," for example, where the charity "has only a contingent remainder interest." H.R. Rep. 91-413 (Pt. 1), 91st Cong., 1st Sess. 58-59 (1969); Treas. Reg. § 20.2055-2(b). They also prevent donors from "obtain[ing] a charitable contribution deduction for a gift of a remainder interest in trust to a charity * * * substantially in excess of the amount the charity may ultimately receive," *e.g.*, where

the trustee has discretionary power to invade corpus for the life tenant's benefit. S. Rep. 91-552, 91st Cong., 1st Sess. 87 (1969).

Besides mandating changes to the form of governing trust instruments, Congress in 1969 enacted new penalty taxes aimed at deterring misfeasance by (among others) fiduciaries of CRTs. Under Code section 4947(a)(2), the actuarial share of a charitable remainderman is subject to the same protections against self-dealing (IRC § 4941), jeopardizing investments (IRC § 4944), and taxable expenditures (IRC § 4945) that apply to private foundations. Transactions in an estate destined for charity are also subject to penalty taxes if the fiduciary fails to comply with the Code's regulatory requirements. *See* Treas. Reg. § 53.4941(d)-1(b)(3); *Rockefeller v. United States*, 572 F. Supp. 9 (E.D. Ark. 1982), *aff'd*, 718 F.2d 290 (8th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).

These statutes reflect Congress's strong policy that gifts destined to charity through CRTs not be frittered away through improper actions by trust fiduciaries. Wholly apart from cases of fiduciary malfeasance, moreover, Congress's objectives will be frustrated whenever the value of a CRT's assets is needlessly reduced below its value when the trust was created. The donor's tax deduction is keyed to the value of property transferred to the trust. *See* note 4, *supra*. If the value of a CRT's property subsequently declines—*e.g.*, because trust assets are sold at improvidently low prices—the amount ultimately received by charity will be reduced, and the legislative subsidy represented by the tax deduction concomitantly wasted.

The resources of the IRS are limited, and charitable remainder trusts are not at the top of the Commissioner's list of enforcement priorities.[23] Even if they were, the IRS

---

[23] In response to a FOIA request, the IRS has advised that it has completed audits of only 22 returns filed by CRTs for fiscal 1987, 1988,

could not possibly detect all cases of possible abuse. Given these facts, the best prophylactic against devaluation of a charity's interest is oversight by the charity itself. If interested charities are directly and immediately involved in judicial proceedings affecting their rights—as the Due Process Clause requires—the enforcement burden of the IRS will be lightened and the objectives of Congress more fully realized.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*WALTER B. SLOCOMBE
ALBERT G. LAUBER, JR.

CAPLIN & DRYSDALE, Chartered
One Thomas Circle, N.W.
Washington, D.C. 20005

Attorneys for *Amici Curiae*

**Counsel of Record*

---

and 1989, and that it currently plans no audits of CRT returns for fiscal 1990.

APPENDIX

APPENDIX

More complete descriptions of *amici* other than Independent Sector are as follows:

1. The American National Red Cross is an instrumentality of the United States and a charitable organization. *See Department of Employment v. United States*, 385 U.S. 355 (1966). Its purposes include providing disaster relief assistance and preparedness, instruction in first aid and safety, and the conduct of blood services programs, including biomedical research.

2. The United Way of America is the national charitable organization of approximately 1,400 local member United Ways. Its members raise over $2.9 billion per year in funds, which are distributed to over 40,000 charitable agencies. The national organization assists the local United Ways, and the agencies they serve, in the areas of fundraising and administration.

3. The Salvation Army is an international religious and charitable movement that conducts a spiritual ministry devoted to preaching the Gospel, disseminating Christian beliefs, supplying basic human necessities, and undertaking the spiritual and moral regeneration and physical rehabilitation of all persons in need. Last year, the organization provided practical assistance to more than 25 million persons in the United States.

4. The National Audubon Society is dedicated to the conservation of wildlife and natural resources. It has almost 600,000 individual members organized into 550 chapters nationwide. Deferred gifts such as charitable remainder trusts account for about 25% of its total contributed income.

5. The General Conference of Seventh-day Adventists is the organization that directs and funds the church's worldwide operations. The Conference has approximately $100 million in known charitable remainder interests. Knowl-

edge and oversight of these trusts is vital to the Conference's operation of its 496 hospitals, dispensaries and nursing homes serving 6.4 million people annually; its 5,400 schools with 795,000 students; its relief and development activities helping 14 million persons per year; and its 26,000 congregations with 6 million members.

6. The Association of Catholic Colleges and Universities is an association of 207 accredited Catholic colleges and universities. The Association's purposes are to facilitate exchange among Catholic institutions of higher education, to represent the members to other national and international church and educational associations, and to assist its members in dealing with various agencies of the Federal Government.

7. The United Church of Christ is a church denomination with approximately 6,200 congregations and 11 million individual members. It operates 350 hospitals and nursing homes, 33 colleges and universities, and 7 seminaries.

8. The Christian College Coalition is an association of 78 Christian institutions of higher education. Its members are affiliated with thirty denominations and have more than 4,000 faculty and 90,000 students. The Association provides various services to members, including promotion of deferred giving programs employing charitable remainder trusts.

9. The Baptist Joint Committee on Public Affairs is composed of representatives from eight cooperating Baptist conventions and conferences, which have a total membership of approximately 30 million persons in the United States. The Baptist Joint Committee represents numerous Baptist agencies, seminaries, and colleges.

10. The Evangelical Council for Financial Accountability comprises more than 600 religious, charitable, and educational organizations. Its purpose is to assist member organizations in their fundraising activities, including advising

and assisting them in the use of charitable remainder trusts, and promoting appropriate supervision of such trusts by federal and state authorities.

11. The National Association of Homes for Children represents more than 400 charitable agencies serving children, including 13 state child-care associations. The Association provides members with a means of solving problems of mutual concern, provides education and training opportunities for members, works to improve the care of children, and represents the interests of the members before Congress and federal agencies.